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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KAREN F. ALEXANDER
Petitioner,

- against -

CHRISTINE TODD WHITMAN; et al.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Harold J. Cassidy, Esq.
Counsel of Record
P.O. Box 280
225 Broad Street
Red Bank, New Jersey 07701
(732) 530-9779

Walter M. Weber, Esq.
The American Center
for Law and Justice
1000 Thomas Jefferson St. N.W.
Suite 609
Washington, DC 20007

49 pp

QUESTIONS PRESENTED

The New Jersey Wrongful Death and Survival Action statutes afford a cause of action to all mothers whose children are tortiously injured prenatally, *at any age of gestation*, and die as a result of that tortious conduct. However, the same statutes deny recovery to one class of mothers despite the fact they can establish every *element of the causes of action*, are in the *identical material circumstances*, and *sustain the identical losses* as the mothers and children who are afforded claims under the statute, only because their children were still in the womb at the moment death ensued from the wrongful act. Kaylyn Alexander, a child who was tortiously and fatally injured at eight-and-one-half months gestation, died immediately prior to delivery by Caesarean Section. Karen Alexander, her mother, challenged the State's denial of Mrs. Alexander's Wrongful Death and Survival Action claims as a violation of the Equal Protection rights of Mrs. Alexander and all mothers and children similarly situated.

1. Does a mother have a fundamental interest in her relationship with her child during pregnancy which is protected by the Due Process clause of the 14th Amendment?

2. Is New Jersey's discriminatory classification and denial of Wrongful Death and Survival Claims to mothers and children such as Karen and Kaylyn Alexander subject to strict scrutiny?

3. Does the denial of a wrongful death or survival suit (which are generally permitted for deaths resulting from prenatal injury) solely on the arbitrary basis of the happenstance that the child died before delivery was completed rather than after delivery, violate the Equal Protection Clause of the Fourteenth Amendment?

4. Does every human being legally within the jurisdiction of New Jersey, including Kaylyn Alexander, a child who died as a result of the tortious acts of others immediately before her birth was completed, and all members of her class, enjoy the Equal Protection of the laws under the Fourteenth Amendment of the United States Constitution as set forth in *Levy v. Louisiana*, 391 U.S. 68 (1968)?

PARTIES TO THE PROCEEDINGS

Petitioner is Karen F. Alexander, the mother of Kaylyn Elissa Alexander, a child who died as the result of negligence of a medical doctor retained to provide competent medical care for both Mrs. Alexander and her daughter. Mrs. Alexander timely instituted wrongful death and survival action claims in the Superior Court of New Jersey against the negligent parties. Despite the fact that the state performed an autopsy on Kaylyn and issued a death certificate in her name identifying her cause of death, the Monmouth County Surrogate refused to issue Mrs. Alexander letters of administration ad prosequendum and general letters of administration because New Jersey is still *one of only ten states* which discriminate against mothers whose children are killed by the tortious acts of wrongdoers only because the children's death ensues in the womb. Because New Jersey permits the claims for other mothers whose children sustain prenatal injuries resulting in death, Mrs. Alexander subsequently instituted this class action pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988 seeking a declaration that the New Jersey wrongful death and survival action statutes violate the equal protection and due process rights of Karen and Kaylyn Alexander.

The respondents are Christine Todd Whitman, in her capacity as Governor of the State of New Jersey, Peter Verniero, Attorney General of the State of New Jersey and six county Surrogates, Maria Vizcarrondo-DeSoto, Surrogate of Essex County; Susan Hoffman Greene, Surrogate for Hunterdon County; Carol Oswald, Surrogate for Mercer County; Marie S. Muhler, Surrogate of Monmouth County; John Pecoraro, Surrogate of Morris County; Elton A. Conda, Surrogate of Burlington County.

The complaint filed in the District Court included as party defendants the remaining fifteen County Surrogates. After service upon them each of those fifteen Surrogates executed a Consent Order of Judgment signed and filed by the District Court. By the terms of those Orders service of papers and briefs upon those parties are not required.

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OTHER LEGAL AUTHORITIES

Arkes, H. Beyond the Constitution, Prin. Univ. Press (1990) 27

Cong. Globe, 35th Cong. 1st Sess. app. 65-66 (1858) . . . 27

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Robertson, J.A. "Legal Considerations in Fetal Treatment" in *The Unborn Patient*, 2nd Ed., editted by M.R. Harrison , 19-24. 23

Tussman and ten Broek, The Equal Protection of the Law, 37 Calif. L. Rev. 341 (1949) 16

The Works of James Wilson, Ed. by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vo. I & II p.314-335. 27

In The

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No. 97-

Karen F. Alexander,
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v.

Christine Todd Whitman; Peter Verniero; et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Alexander respectfully prays that a Writ of *Certiorari* issue to review the May 23, 1997 judgment and opinion of the United States Court of Appeals for the Third Circuit.

ORDERS AND OPINIONS DELIVERED IN THE CASE

The United States Court of Appeals for the Third Circuit filed an opinion in this case on May 23, 1997, reported at 114 F.3d 1392 (3rd Cir. 1997) (App., A1-30), and entered an order of judgment affirming the District Court's dismissal of the Complaint (App., A115-116), which filed an opinion and Order dismissing plaintiff's complaint and denying the plaintiff's cross motion for summary judgment on May 18, 1995 (App., A35-48) and entered an Order dated July 10, 1997 affirming the Order of dismissal and fixing costs (App., A113-114).

STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review the final Order of the United States Court of Appeals entered May 23, 1997. The Petitioner has claimed rights under the Constitution of the United

States, the issues presented were properly raised below and jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amend XIV, §1, and asserts that New Jersey's wrongful death [N.J.S.A. 2A:31-1 to 6] and survival action [N.J.S.A. 2A:15-3] statutes violates the Equal Protection rights of Karen and Kaylyn Alexander and those similarly situated [verbatim provisions of the statutes and Amendment XIV, §1 required by R.14(1)(f) are set forth in Appendix at A31-34.

STATEMENT OF THE CASE

The Petitioner, who had instituted a pending State Court action in which she can prove every element of New Jersey's wrongful death and survival action claims against the parties who negligently caused the death of her daughter, instituted this class action because New Jersey denies her the benefits and protection of those statutes - designed to protect the same basic and fundamental interests in the relationship between a mother and child which is protected by the Due Process Clause - only because she is a member of a class of women against whom the state discriminates without any legitimate state interest.

A. THE NATURE OF THE ACTION AND PROCEDURAL HISTORY

The class action complaint, brought pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988, seeks a declaration that New Jersey's wrongful death and survival action statutes violate the equal protection clause of the 14th Amendment and the issuance of a mandatory injunction. The action, filed on October 24, 1994, was brought by Karen Alexander, a mother whose daughter, Kaylyn, died on July 15, 1992 as a result of medical malpractice (Malpractice complaint A125-146). The District Court had jurisdiction under 28 U.S.C. §1343 and the relief sought is authorized by 28 U.S.C. §2201-2202. Venue was established under 28 U.S. §1391. The Defendants Governor Christine Todd Whitman and the State Attorney General, joined by the Surrogates, moved to dismiss the complaint under Rule 12(b)(6)(31A-33A).

The Plaintiffs cross-moved for Summary Judgment on the counts which seek declaratory and injunctive relief (A110-112), and for class certification. The motions were argued on March 6, 1995. Fifteen of the County Surrogates executed Consent Orders of Judgment, entered on May 18, 1995, barring their opposition to the Plaintiff's claims and consenting to the class certification. The District Court, by order entered May 18, 1995, granted the motion to dismiss the Complaint, denied plaintiffs' motion for Summary Judgment, and dismissed the motion for class certification (App., A35-48). A Notice of Appeal was timely filed on June 15, 1995 appealing all issues as to the first four counts and amended on June 27, 1995 (A160). On May 23, 1997 the U.S. Court of Appeals for the Third Circuit entered an opinion written by Judge Theodore A. McKee and a concurring opinion by Judge Samuel A. Alito affirming the District Court's dismissal of the complaint.

B. STATEMENT OF FACTS

On July 15, 1992, Karen Alexander, pregnant with her thirty-eight week old daughter, Kaylyn, was admitted to Jersey Shore Medical Center for Kaylyn's delivery. Although previously healthy, with vital signs recorded only fourteen minutes prior to birth by cesarean section, Kaylyn expired prior to being born at 3:04 p.m. (A147-150). Following Kaylyn's death Mrs. Alexander asked the nursing staff to bring little Kaylyn to her so she could hold her in her arms. After she held Kaylyn and studied the features of the little girl she carried for almost nine months, it was difficult for Mrs. Alexander to let her daughter go (A149). An autopsy was performed on July 18, and a death certificate was issued showing the baby's date of death, that her name was Kaylyn Elissa Alexander and that she was "stillborn" due to "cardio vascular collapse." Kaylyn's photo taken by the nursing staff appears at A156. On July 13, 1994, Mrs. Alexander filed a complaint for medical malpractice in the Superior Court of New Jersey, Docket No. L-3896-94 (A125-148). Mrs. Alexander obtained medical expert opinions that the baby's injury, pain, suffering and death was due to the malpractice of health care providers on July 15, 1992. The complaint included a wrongful death action and a survival action as a result of the injury, pain, and suffering sustained by Kaylyn prior to death. On October 18 and October 31, 1994, the Surrogate of Monmouth County refused to issue letters of adminis-

tration *ad prosequendum* and general letters of administration of the Estate of Kaylyn Alexander (A122-124). After this action was commenced the malpractice action was stayed by the Superior Court of New Jersey in order to await the outcome of the class action suit. The stay has not been lifted. Upon motion by the defendants in the State Court action Mrs. Alexander's separate claim for emotional distress ("Portee" claim) was dismissed based upon the requirements of substantive state law. (Order, A162-165).

In the federal action it was established that Mrs. Alexander and her daughter had an existing relationship during pregnancy before the child's death (Class Action Complaint, ¶29-38, ¶40; 9A-15A). Kaylyn, throughout pregnancy, was a complete, separate, unique and irreplaceable human being [¶40]. Children experience pain beginning at eight weeks after conception (complaint ¶40; App. at 15A). All of these facts were supported in the record by the Plaintiffs' scientific and medical proofs (89A-111A). The defendants conceded these facts on the motions. New Jersey's Supreme Court has found that children are separate human beings beginning at conception and doctors have an independent duty to the children during pregnancy (see, *infra*, at 8-9:15-16.) The District Court accepted all of these facts as true. The U.S. Court of Appeals expressly accepted all of these facts as true for purposes of its decision. [(114 F.3d 1392, 1396-1397, 1401(text and FN 10); App. A13 (text and FN10); A4-6].

REASONS WHY CERTIORARI SHOULD BE GRANTED

The Writ of Certiorari should be granted in this case under Rule 10(c) for three compelling reasons.

First, as it concerns the Equal Protection rights of Karen Alexander and all women similarly situated, the decision of the U.S. Court of Appeals is in direct conflict with the controlling decisions of this Court - especially those which have set forth the principles of Equal Protection as they apply to wrongful death statutes and where this Court has held a wrongful death statute in violation of Equal Protection Clause - including *Levy v. Louisiana*, 391 U.S. 68 (1960); *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); and *Parham v. Hughes*, 441 U.S. 347 (1979). The U.S. Court of Appeals held that the Equal Protection Clause does

not require states to treat similiarly those who are similiarly situated and refused to apply strict scrutiny to a classification of women excluded from the benefits and protection of statutes this Court has previous expressly stated involved interests considered fundamental under the Due Process Clause.

Second, the holding of the Court of Appeals, in deciding the rights of Kaylyn Alexander, that there are human beings who do not have Equal Protection Rights under the Fourteenth Amendment is in direct conflict with this Court's decisions including *Levy v. Louisiana*, *Plyler v. Doe* and *Yick Wo v. Hopkins*.

Third, the incorrect interpretation by the Court of Appeals of this Court's decision in *Roe v. Wade* creates interpretational conflict in the decisions of this Court which only this Court can, and should, resolve.

INTRODUCTION: THE NEW JERSEY WRONGFUL DEATH AND SURVIVAL ACTION STATUTORY SCHEME.

New Jersey is *one of only ten states*[1] which denies recovery to a woman who loses her child as a result of tortious conduct simply because the tortfeasor's acts resulted in the child's death while still in the womb, while permitting the same claim for women whose children of equal or younger gestational age suffer prenatal injuries but the death fortuitously occurs outside of the womb. There simply is no difference in the loss sustained by Mrs. Alexander and those women who are permitted recovery, no legitimate interest of the state which justifies the discriminatory classification, and thus no rational - much less compelling - basis for such discrimination.

Mrs. Alexander's attack on New Jersey's wrongful death statute is based on her own equal protection rights. It is her legal and human interest in her relationship with her child, interests which are protected by the wrongful death statute and deemed fundamental under the Due Process Clause, which she lost when her daughter Kaylyn died at the hands of tortfeasors. Mrs. Alexander was able to establish every element of the wrongful death cause of action.

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[1]See Addendum 3 which lists all states which recognize wrongful death and survival action claims in stillbirth cases.

New Jersey's caselaw has long recognized that those in Kaylyn's class are complete, separate, unique, irreplaceable human beings from the moment of conception. New Jersey did not contend otherwise in this suit. New Jersey admits that Kaylyn and all members of her class are persons in fact and that Mrs. Alexander lost a family member. The New Jersey Supreme Court has stated that the only reason Mrs. Alexander has been denied her wrongful death claim is because more than a century ago the legislature, because of the lack of the benefits of modern scientific and medical knowledge, operated under the erroneous belief that a baby was not a human being before birth, but only a "part of the mother". In this case New Jersey now maintains the position that it does not need a valid interest to deny Mrs. Alexander a claim. Thus, third parties can negligently or even intentionally kill a child against the mother's will with effective impunity as long as that mother is a member of the class discriminated against.

The U.S. Court of Appeals accepted the facts advanced by the plaintiff as true but issued a decision upholding the statute in direct conflict with the controlling decisions of this Court, and all of this Court's holdings on challenges to Wrongful Death Statutes.

A. Compensable Prenatal Torts, and The Purposes and Deterrence Policy of New Jersey Tort Law

New Jersey extends personal injury claims to children who are injured as a result of tortious conduct when the child is in utero at the time of the injury, trauma or tortious act which forms the basis for liability. *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960). Tortious acts committed at any time between conception and birth which cause injury are actionable, since the purpose of the claim for prenatal injuries is to provide protection of the health and life of children throughout the entire period of gestation. *Id.* Three of the reasons *Smith v. Brennan* recognized the cause of action for prenatal trauma are relevant to this case.

First, the previous denial of a claim for prenatal injuries was based upon a false assumption of medical and scientific fact first found in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (Sup. Jud. Ct. 1884). Correcting this false assumption, *Smith* held that it is a scientific fact that a child has a separate existence from her mother from conception:

> Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body. id. at 502.

Second, *Smith* rejected the argument that proof of a causal connection between tortious conduct and an injury not discovered until birth or later is so difficult:

> ...the mere difficulty of proving a fact is not a very good reason for blocking all attempts to prove it. *Smith* at 503.

Third, *Smith* rejected limiting the claim to injuries sustained only after the baby reaches the age of so-called "viability".

> The viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act....And since it has no cogent medical reason to support it, and no relevancy to the harm resulting from prenatal injury, we do not believe that it has any place in the determination of the question of liability for wrongful conduct. *Smith* at 504-505.

New Jersey tort law has two separate purposes: to compensate victims of wrongful conduct. *N.J. Power & Light Co. v. Mabee*, 197 A.2d 194, 195-196 (N.J. 1964); and the protection of the health and lives of individuals by deterring tortious conduct before it occurs through a legal system which imposes liability upon the wrongdoer. *Cowan v. Doering*, 545 A.2d 159, 167 (N.J. 1988); *Weinberg v. Dinger*, 524 A.2d, 336, 375 (N.J. 1987); *People Express v. Conrail*, 495 A.2d 107, 111 (N.J. 1985).

> ...the policy that undergirds our immunity ... will deter fault-based "system of tort law [includes] *the discouragement of unreasonable conduct...*[e]liminating immunity ... will deter unreasonable conduct." Cowan, at 167 (emphasis added).

> Imposing liability on defendants for their negligent conduct *discourages others from similar tortious behavior, fosters safer products to aid our daily tasks, vindicates reasonable conduct that has regard for the safety of others....Peoples Express,* 495 A.2d at 111 (emphasis added).

New Jersey's tort law has developed in recognition that doctors alter their conduct based upon fear of tort liability. See, e.g. *Carey v. Lovett*, 622 A.2d 1279, 1287 (N.J. 1993). Since tortious conduct is not criminal the deterrence effect of tort law is, in most instances, the only protection of persons which helps prevent harm before it occurs.

B. Claims Created Under New Jersey Law for Prenatal Injuries which Result in a Child's Death

1. The Wrongful Death Claim

The wrongful death statute (*N.J.S.A. 2A:31-1 to 6*) creates a claim for a mother whose child dies as a result of tortious conduct. *Green v. Bittner*, 424 A.2d 210 (N.J. 1980). It did not exist at British or early American Common Law and constitutes an entirely new cause of action. *Giardina v. Bennett*, 545 A.2d 139, 145 (N.J. 1988). The action is brought by an administrator ad prosequendum. *N.J.S.A.* §2A:31-2. The beneficiaries are those family members entitled to receive intestate property and it is not required that they were dependent upon the decedent. *N.J.S.A.* 2A:31-4; *Cassano v. Durham*, 436 A.2d 118 (N.J.L.D. 1981).

Under the act a mother is entitled to recovery for the "pecuniary" value of the loss of the companionship of her child due to the child's death. *Green v. Bittner, supra*; Carey v. Lovett, 622 A.2d 1279, 1295 (1993). The damages are derived from, and provide compensation for, the loss of companionship and special relationship between a mother and her child over the child's lifetime. *Green* at 217; see, also *Giardina* at 140. Thus the mother's interest in the relationship with her child is the same interest protected by the Due Process Clause as fundamental. See, e.g. *Santosky v. Kraemer*, 455 U.S. 745, 753, 759 (1982); *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Levy v. Louisiana, supra* at 71; *Farley v. Sartin*, 466 S.E. 2d 522, 530-531 (W.Va.,1995).

The wrongful death claim is but one of three causes of action for prenatal injuries which result in the child's death. New Jersey also recognizes survival action claims and the so-called *Portee* claims. The three separate claims, however, each protect distinctly different interests, and compensate for very different losses.

2. The Survival Action Claim

The survival action statute, *N.J.S.A.* 2A:15-3, which repeals the common law rule that an action for personal injury extinguishes upon the death of the injured party, gives the estate of an injured child the claim the child would have had if the child's death had not ensued. *Dyer v. City of Newark*, 416 A.2d 429 (N.J.A.D. 1988); *Soden v. Trenton and Mercer Cty. Trust Co.*, 127 A. 558 (N.J. 1925); *Alfone v. Sarno*, 97 N.J. 99, 105-110 (1981); see, *Giardina* at 146. It is brought by the General Administrator of the decedent's estate. *Hickman v. Taylor*, 75 F.Supp. 528 (D.C. Pa 1948), aff. 170 F.2d 327. The damages recoverable are for the pain and suffering of the decedent between the time of injury and death. *Foster v. Maldonado*, 315 F.Supp. 1179 (N.J. 1970). The estate may also recover hedonic damages - the loss by the decedent, while alive, of the enjoyment of life - even if the injured child was unconscious and unable to appreciate her incapacitation. *Eyoma v. Falco*, 589 A.2d 653, 658 (N.J.A.D. 1991). The survival action is designed to protect, not the personal interests of the mother, but the health and life of the child (where the child is the potential victim). The losses for which compensation is awarded, therefore, are to compensate for the injury to the child while alive, rather than the loss to the mother.

3. The *Portee* Claim

One who suffers severe psychological injury as a result of witnessing the injury and death of a close family member has a claim for emotional distress. *Portee v. Jaffee*, 417 A.2d 521 (N.J. 1980). New Jersey recognizes this claim for mothers of children who suffer prenatal injuries which result in the child's death in both stillbirth cases, *Giardina v. Bennett*, at 140-143 (N.J. 1988), and live birth cases, *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993).

> We recognized in these...malpractice cases that the malpractice eventuating in the tragic births had a direct and foreseeable impact on the family as a unit. *This was a reflection of the strong and intimate bonds between the respective parents and their child. The relationships in this case are not different and the expectations of the parents are not distinguishable. Consequently, the parental and family interests, and the duty to*

protect those interests, are the same. Giardina v. Bennett, at 142 (emphasis added).

The *Portee* claim is designed to protect the health of the mother, rather than the mother's relationship with the child or the child's health and life. The *Portee* damages are measured to compensate for the emotional distress of the mother due to the "loss of a loved one". However, to recover the mother must demonstrate an emotional distress of a very severe nature; thus, mothers in stillbirth claims usually do not have a cognizable *Portee* claim. *Matawaran v. Thompson, et al.* Sup.Ct. of N.J.App.Div., June 19, 1996 [App, A103-109]; see also *Carey v. Lovett*, 132 N.J. at 62; *Dunphy v. Gregor*, 136 N.J. 99, 108 (1994).[2]

The *Portee* claim is not designed to replace the wrongful death or survival actions, but is merely a recent complement of those claims intended to protect a separate and distinct interest of the mother. These three claims -wrongful death, survival action and the *Portee* claim - although having a common source, protect different interests and provide different damages for different losses. Addendum 1 found at the end of this Petition is a chart, a part of the record below, comparing these three claims for prenatal injuries to a child which result in the child's death.

C. The Excluded Class Under the Wrongful Death and Survival Action Statutes.

Although New Jersey permits wrongful death and survival claims for mothers whose children are injured in utero at *any* gestational age, which results in the child's death, New Jersey denies those claims to such mothers if the child happens to be in the womb, not at the time of the wrongful act, but only at the moment death. *Giardina*, at 143-147.

1. The Nature and Scope of The Excluded Cases

Children who die from a prenatal injury qualify for a survival action and their mothers possess a wrongful death claim. The class

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[2]Mrs. Alexander's *Portee* claim was dismissed in the State Court because she could'nt establish the minimum severity required. (Order, App.A-162).

of mothers and children who are denied these claims are only those where the child's death ensues in the womb. The classification has nothing to do with age, development, the harm to the mother or child, or any quality of the human being. It is an arbitrary class who are found among the same class of persons to whom the wrongful death and survival action claims are extended. One mother and her child have claims while another mother and child have none, even where the child's age, development, life, the value of that life, and the mother's loss are the same.[3]

The class of mothers who are permitted wrongful death and survival action claims involve children of every age from conception to birth constituting one class without reference to so-called "viability". Those who are among the class excluded for the benefit of the statute likewise involve children who are both pre-viability and post-viability. *Smith v. Brennan*, 157 A.2d 497, 504-505 (N.J. 1960) (p.6-7 *supra*). The duty to avoid injury to a child, and the liability resulting from a breach of that duty, is unrelated to "viability". *Smith*, at 504, 505. (See quote p.7 *supra*).[4]

2. The State's only Basis for Excluding the Class of Mothers from its Protection has been Acknowledged by New Jersey to be an Incorrect Assumption of Fact.

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[3]Members of the class of mothers whose children sustain prenatal injuries and die in utero, are members of the larger class of mothers whose children sustain prenatal injuries which result in death. They, in turn, are members of the larger class of mothers whose children sustain prenatal injuries. Addendum 2, which was a part of the record below, found at the end of the Petition, diagrams the relationship of these classes and subclasses.

[4]Confusion concerning the relevence of "viability" derives from this Court holding that "viability" is relevant to the *competing* interests where a mother seeks to terminate a pregnancy. See, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parent. of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). The relevence of "viability" is limited to the unique considerations involved in balancing the competing interests of the state with the right to an abortion. In the present case there are no competing interests to balance. The mother's fundamental interest in her relationship with her child, her interest in her child's life, the child's interest in her own life and the state's interest in the health and life of the child and mother are all in harmony and seek the identical result: protection of the child's life. See *Farley v. Sartin*, 466 S.E. 2d 522, 526-535, (W.Va. 1995).

The New Jersey Supreme Court emphasized that it did not exclude stillbirth claims because "prenatal" injury would pose special problems of proof:

> Our reasons for not adopting a more expansive interpretation of the statutory term "persons" in this context do not relate to the speculative nature of damages that would occur if fetal death qualified as any actionable wrongful death under the act. *Giardina v. Bennett* at 147.
>
> ...the mere difficulty of proving a fact is not a very good reason for blocking all attempts to prove it. *Smith*, 157 A.2d at 503.

The United States Supreme Court has indicated that in Equal Protection cases, like this, difficulty of proofs cannot support an otherwise impermissible classification:

> Problems of proof cannot justify an impenetrable barrier that works to shield otherwise invidious discrimination. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

The only reason the statute is interpreted to exclude mothers whose children's prenatal injuries result in pre-birth death instead of post-birth death is an assumption of fact made more than a century ago which New Jersey's Supreme Court in *Smith*, at 502-505, has since said was false:

> The Act thus refers specifically to the wrongful death of a "person," to the "person injured," and to the "death of the person injured."...At the time the Act was enacted it was not generally thought that a fetus could be considered a "person," in a legal or juridical sense. This is evidenced by the common law, which treated an unborn child as being "merely a part of his mother without separate existence or personality." *Smith v. Brennan*, 157 A.2d 497, 502-503 (N.J. 1960) (discussing common-law treatment of the unborn); *(other citations omitted)*...It is readily inferable that the Legislature adopted this common-law understanding of the concept of a "person" in the adoption of the Wrongful Death Act. *Giardina,* at 143.

This erroneous assumption of medical fact--that the child is

"merely a part of his mother without separate existence or personality"--is the same erroneous assumption found to be false in *Smith v. Brennan*, 157 A.2d 497, 502-503 (N.J. 1960). In *Smith* the same court recognized that it could no longer ignore that the child was *in fact a separate individual human being.* The New Jersey Supreme Court therefore has found that the only "basis" for the classification which discriminates against Karen and Kaylyn Alexander is a complete mistake it sought to correct in 1960.

The great irony of *Giardina* is that it recognized the child (before birth) as a person in fact and extended *Portee* claims to the mother for the wrongful death of children who died as a result of injuries in utero. However, the Court used the archaic mistake of fact, which it knew to be false - that the child is "only part of her mother" - as a basis to deny wrongful death claims to mothers of only some of the class of children injured in utero. That is, the State denies the wrongful death claim of mothers of children who died from injury sustained in utero only if the death arbitrarily ensued in the womb.

The survival action statute also arbitrarily excludes these children from its protection. *Giardina*, at 146. *Giardina* (citing *Smith v. Brennan)* ruled that because the child could recover for prenatal injuries, this fact satisfied the statutory requirement limiting recovery to situations where the decedent's death is one "such as would, if death had not ensued, have entitled" the child to maintain an action for "damages resulting from the injury."[5]

The fact that a child, beginning eight weeks after conception, can experience pain renders the injury compensable under New Jersey law [see, *Carey,* at 1290-1291 (pain of new born, although not capable of articulation and not conscious in the broadest

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[5]*Giardina* observed: "We note that under *Smith, supra*, a child may recover for tortiously inflicted prenatal injuries, and find that this satisfies the requirement limiting recovery to situations where the decedent's death was one "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury." *N.J.S.A.* 2A:31-1; *see Graf, supra*, 43 N.J. at 305-06 (reaching some (sic) conclusion on the meaning of requirement that recovery be possible only if party could have recovered if she had not died); *see also Presslaf v. Robins*, 168 N.J.Super. 543 (App.Div.1979) ("if death had not ensued" language intended only to qualify kind of actionable conduct of tort-feasor that will support lawsuit). We thus disagree with those jurisdictions that would disqualify a fetus on these grounds." *Giardina*, 545 A.2d at 146 (n.2).

sense, is compensable)], the only bar to recovery being that the tortious act caused a pre-birth death of the child, instead of a post-birth death. The only "basis" for this classification is the false assumption of fact which New Jersey discarded in 1960.

I. THE DECISION OF THE U.S. COURT OF APPEALS CONCERNING THE EQUAL PROTECTION RIGHTS OF MRS. ALEXANDER AND ALL WOMEN SIMILIARLY SITUATED DIRECTLY CONFLICTS WITH ALL OF THE CONTROLLING DECISIONS OF THIS COURT.

The U.S. Court of Appeals sets forth its decision and analysis concerning the Equal Protection rights of Mrs. Alexander at 114 F.3d 1406 - 1408 [App.,A25 toA28]. Its decision is in direct conflict with the controlling decisions of this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968), *Glona v. Amer. Guar. Liab. Ins. Co.*, 391 U.S. 73 (1968), *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), and other decisions of this Court.

A. The Decision of the Court of Appeals is in Direct Conflict with *Glona v. Amer. Guar.* and is based upon its Express Statement that the Equal Protection Clause does not Require a State to Treat Similiarly Those Persons Who are Similiarly Situated, a Premise which Conflicts with The Most Basic Tenets of Equal Protection Jurisprudence as Defined by this Court.

In *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) this Court held that Louisiana violated the Equal Protection Clause by denying a class of mothers claims under its wrongful death statute. In *Glona*, just as in this case, the Equal Protection rights violated was that of a mother whose child died as the result of the tortious conduct of others. Louisiana denied the plaintiff the benefits of the wrongful death statute because Louisiana created the legal fiction that a child born out of wedlock was a non-person and therefore the mother did not sustain the loss of her child. Like Louisiana, New Jersey denies Mrs. Alexander a claim because New Jersey has created the legal fiction that Kaylyn Alexander is "a non-person" under its wrongful death statute and therefore Karen Alexander never sustained the loss of her daughter. Both states ignored the reality that the child existed and the mother had an

actual interest in, and relationship with, the child.

Glona emphasized that a state is not free to create classifications in wrongful death cases which deny claims by ignoring the factual relationships involved. The actual facts, not legal definitions which fictionalize or ignore them, define the classes which are relevant to determine who are similarly situated for purposes of Equal Protection analysis. *Glona* eloquently observed:

> "To say that the test of Equal Protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses." *Glona*, at 75, 76.

In this case the U.S. Court of Appeals totally ignored the reasoning and holding in *Glona*. The Court of Appeals failed to acknowledge this aspect of *Glona* and identify in what way there are any material factual differences between the mothers whose losses are compensated and those whose losses are not. In fact, the Court did not even mention *Glona* in its Equal Protection analysis and although it cites *Glona* in passing in a different section, 114 F.3d at 1404-05, it never addressed these principles or the *Glona* holding. Instead, the Court of Appeals stated:

> Ms. Alexander's argument fails because she also argues that there is no difference between the mothers in those two classes. She asserts that mothers in her class sustained "the same loss as other mothers to whom New Jersey gives the claim." Appellants' Brief, at 19. *While that may be true insofar as it states the similarity between the respective tragedies, it is not true insofar as it attempts to foster a principle of Equal Protection jurisprudence.* 114 F.3d at 140(emphasis added).

The statement of the Third Circuit, that "similarity" of one's situation is irrelevant to "principle(s) of Equal Protection jurisprudence," is a fundamental misstatement of constitutional principles which conflicts with every case this Court has decided in the area of Equal Protection. All persons "similarly situated" or "similarly circumstanced" shall be "treated alike" or "similarly treated". *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Glona, supra*;

Tussman and ten Broek, The Equal Protection of the Law, 37 Calif. L. Rev. 341 (1949). The location of the child at the moment of death ensues no more operates to define, alter or affect the nature, character, or extent of the loss each mother sustained, or the similarity of the circumstances of those mothers, than did the fact of whether or not the mother in *Glona* was married when she gave birth to the child tortiously killed. Likewise, a mother who losses a child at six months gestation, or any gestational age who is compensated for that loss under the New Jersey statute has sustained no greater or lesser loss than did Karen Alexander when her child died at eight and a half months gestation. The losses of those who are allowed recovery are identical to the loss of Mrs. Alexander. In fact, had she carried identical twins, conceived at the same time whose deaths were caused by the very same tortious act, the loss of one would be compensable, while not the loss of the other, if death ensued after birth for only one of them. The classification of New Jersey's statute defines the very meaning of an arbitrary classification.

The statement of the Court of Appeals aknowledges that Mrs. Alexander is similiarly situated to other mothers whose loss is compensated under the statute. The state has never even alleged a difference in such losses. The fact that the loss sustained in pre-birth deaths and post-birth deaths are the same is not only admitted by New Jersey, but is the basis of the so-called *Portee* claim.

The relationship of Karen and Kaylyn Alexander, according to *Giardina*, involves the "intimate bonds" and the "intimate relationships" between a mother and her child during pregnancy and "*parental and family interests, and the duty to protect those interests, are the same*" in still-birth cases as where the baby is born alive. The two circumstances "are not different," and the "expectations" in the first are "not distinguishable" from the second. 545 A.2d at 142. The mothers in *Scafidi v. Seiler*, 574 A.2d 398 (N.J. 1990) (live birth at 26 weeks gestation), *Carey* (live birth), *Giardina* (still birth), and Mrs. Alexander all had the same "relationship,"[6] the same "expectations" and the same loss.

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[6] *Carey*, eloquently described the intimate relationship of mother and child during pregnancy which the law protects:

The unique relationship between a pregnant woman and her baby

Giardina recognized that all children, including "stillborn", are persons both in fact and law. New Jersey recognizes that a child, while in her mother's womb, is a person in fact, and recognizes the child's "legal status" as a person - "a loved one". *Giardina*, at 143. Therefore, New Jersey recognizes the "legal" status of Kaylyn Alexander as person for purposes of the *Portee* claim, but arbitrarily withholds the "legal" status of person for purposes of the wrongful death claim while, obviously, she is a person in both factual circumstance since both claims would arise out of the same tortious act at the same moment in time. This is exactly the kind of "legal" distinction which *Glona* at 75, 76 stated was forbidden by Equal Protection.

The life of every child is equal under the law. *Glona* held that being similarly situated with respect to the loss actually sustained was the relevent basis for determining an equal protection violation.

B. The Standard of Scrutiny: the Decision of the Court of Appeals is in Direct Conflict with *Weber v. Aetna* and other Precedents of this Court.

The Court of Appeals in this case applied only the rational basis standard of review to the discriminatory classification (114 F.3d at 1407-1408) in direct conflict with *Weber v. Aetna*, 406 U.S. 164 (1992) in which this Court made it clear that a classification in a wrongful death statute must be subjected to strict scrutiny and only a compelling state interest can justify it. *Weber*, 406 U.S. at 172-173. The fact that the Court of Appeals ignored the holding of *Weber* requires the issuance of a Writ of Certiorari.

Weber held that because the wrongful death portion of Louisiana's worker's compensation statute implicated personal interests it must be subjected to strict scrutiny:

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mitigates the need for the additional requirements of an "indirect claim" for emotional distress. Bound by physical and emotional ties, mother and baby are so closely joined that we need not require that the mother be "shocked" by malpractice on the baby. The maternal-fetal relationship bespeaks the genuineness of an otherwise-valid claim for emotional distress...*Carey*, at 1285-1287

> Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. (citations omitted). The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? 406 U.S. at 172-173.

The Court of Appeals fails to cite either *Weber* or *Levy* in its section on Mrs. Alexander's Equal Protection rights. That Court does, however, in its Due Process section, acknowledge that *Levy* clearly held that the relationship of parent and child were involved in the wrongful death statute and that this Court's recognition of that involvement "informed the decisions in *Glona* and *Weber*." 114 F.3d at 1404-1405. Likewise the Court of Appeals acknowledged that *Weber* employed strict scrutiny. At 1405.

The *Weber* court acknowledged that Louisiana had advanced a state interest which was legitimate, *Weber*, at 173, but because it was not a "compelling interest" necessary to justify a classification which "endangers" a fundamental right, the statute was held to violate the Equal Protection Clause.

> Whatever the merits elsewhere of this contention (promoting the state's interest in protecting "legitimate family relationships"), it is not compelling in a statutory compensation scheme..." 406 U.S. at 173.

This Court first concluded that wrongful death statutes "involve the intimate, familial relationship between a child and his own mother" in *Levy*, *supra*, at 71. *Levy*, published four years before *Weber*, emphasized the Court's heightened scrutiny when basic civil rights are involved:

> [W]e have been extremely sensitive when it comes to basic civil rights (citations omitted) and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. (citations omitted). The rights asserted here involve the intimate, familial relationship between a child and his own mother. 391 U.S. at 71.

Nevertheless, the Third Circuit ignored the holdings of *Levy*, *Glona* and *Weber*, cases in which this Court struck down wrongful death statutes because they involved relationships deemed fundamental and discriminated in their protection of those interests without any compelling interest to justify that discrimination. Instead the Court below offered an unintelligible interpretation of *Levy*, no analysis of *Glona (the case which most parallels this one) at all*, and no attempt to explain the strict scrutiny applied in *Weber*.

It is odd, and totally incorrect, for the Court of Appeals to suggest that "the interest in issue" in *Levy*, *Glona* and *Weber* was an "interest" in "the classification of the child's legitimacy". 113 F.3d at 1405. Those cases involved an interest in equal protection and equal treatment under the law. This Court sustained challenges to wrongful death statutes because the classification of mothers (*Glona*) and children (*Levy*) based upon the marital status of the mother at the time of birth had nothing to do with the nature of the existing relationship, the nature of the loss to the mother in *Glona*, to the children in *Levy* and *Weber*, or the purpose of a statute designed to compensate a loss where a tortfeasor wrongfully kills the child.

Second, the attempt by the Court of Appeals to distinguish the holding in *Glona*, where the mother's Equal Protection interests were at stake, by saying the classification in *Glona* was unreasonable because the child was not involved in the conduct of the adult is absurd. The mother in *Glona* whose Equal Protection Rights were asserted was directly involved in the conduct of producing an out-of-wedlock birth, conduct which Louisiana tried to discourage by refusing to permit the mother to recover under the wrongful death statute. The reasoning applied to the child in that regard did not apply to her. Obviously, a state interest in legitimate family relationships and deterrence of out-of-wedlock births did not justify the discrimination against the mother because a basic civil right and fundamental interest was involved and because the classification bore no relationship to the purpose of the wrongful death statutes (See, *Weber* at 175).

The Court of Appeals offered no explanation why it ignored *Weber's* requirement of a compelling state interest. The Court seems to make an attempt to justify ignoring *Weber* (and even *Glona*) by pointing out that one wrongful death statute which excluded a small class of fathers from its benefits was upheld in

Parham v. Hughes, 441 U.S. 347 (1979). But a close analysis of *Parham* only supports Mrs. Alexander's position and underscores the error of the Court of Appeals in its failure to follow *Weber*, *Levy* and *Glona*. The small portion of the class of fathers of illegitimate children who were excluded from the benefits and protection of Georgia's wrongful death statute did not have either an actual *relationship* with their children of a *nature* which was intended to be protected by Georgia's wrongful death statute or a relationship with their children of a nature which gives rise to an interest protected as fundamental under the Due Process Clause.

The New Jersey statute excludes Mrs. Alexander despite the fact she possessed exactly the kind of relationship the statute is intended to protect, and does protect for others similiarly situated. Moreover, Mrs. Alexander's relationship with Kaylyn is one protected as fundamental under the Due Process Clause. Kaylyn was conceived in marriage in a traditional family. The plaintiff in *Parham* "fathered" the child out-of-wedlock, never lived with the child, never had custody, and despite the state extending him the opportunity to legally accept the duties of fatherhood by legitimizing his child, failed to do so. Under those circumstances the Georgia statute did not permit him to sue where the child, for whom he never took proper responsibility as a father, died. It was not the kind of relationship Georgia sought to protect, and therefore the exclusion of this small class of fathers did have a relationship to the purpose of the statute in strong contrast to the excluded classes in *Glona*, *Levy* and *Weber*, and this case. Likewise, unlike *Weber*, *Levy* and *Glona*, the father in *Parham* did not have a relationship which gave rise to an interest protected by Due Process as fundamental. This Court's holdings in a line of cases dealing with the issue of whether and to what extent a natural father of a child born out-of-wedlock enjoys any Due Process protection of his relationship with the child explains both the different result in *Glona* and *Parham* and underscores that *Weber* applied strict scrutiny because of the fundamental rights involved.

At the time *Levy* and *Glona* were decided in 1968, this Court had never directly addressed whether a parent enjoyed an interest protected by Due Process in a relationship with an illegitimate child. The first such case was *Stanley v. Illinois*, 405 U.S. 645 (1972), argued and published shortly before *Weber* was decided. Prior to *Levy* and *Glona* the Court had held that the relationship

and companionship between parent and child was protected as a fundamental due process liberty interest, but only in the context of the traditional family. See, e.g. *Meyer v. Nebraska*, 262 U.S. 390 (1922); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-536 (1924); *May v. Anderson,* 345 U.S. 528 (1953). The relationship within marriage and the traditional family is always protected as fundamental. *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977); *Santosky v. Kraemer*, 455 U.S. 745, 753, 759 (1982). Entitlement to such protection has been said to be "self evident." *Lehr v. Robertson*, 464 U.S. 248, 256 (1982).

Stanley established that a father who had an actual relationship with his illegitimate child enjoyed a liberty interest protected by Due Process. When *Weber* was decided, therefore, this Court had established that the parent of a child born out-of-wedlock could have a protectable Due Process interest. But the degree of constitutional protection afforded a father of a child born out-of-wedlock depends upon the strength of the relationship and there exists a very strong correlation between the duty to the child accepted by the father and the degree of protection of the interest provided by the Due Process Clause. See and compare, *Stanley v. Illinois*, *supra*, *Caban v. Mohammed*, 441 U.S. 350 (1979) [two cases where statutes were struck down as violative of the Due Process interests of a father of a child born out-of-wedlock] with *Quillion v. Wolcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983); [two cases where the father's relationship with a child born out-of-wedlock was not sufficient to justify due process protection] and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) [the relationship of a father and child, where the father was not married to the child's mother, was not recognized as sufficiently vital to defeat the rights of the family unit and of the natural mother and her husband).

The different results in *Glona* (where the statute was held violative of Equal Protection) and *Parham* (where the statute excluded no mother, but only those fathers of illegitimates who never legitimized their children) is due in part to the fact that a mother who carries a child always has a fundamental interest in the relationship. *Lehr v. Robertson*, 464 U.S. 248, 256 (1982)(entitlement to the protection is "self-evident" at 256); *Caban v. Mohammed*, 441 U.S. 380, 397(1979).

In short, contrary to the comments of the Court of Appeals, the fact of illegitimacy operated against the litigants in *Levy*, *Glona* and

Weber, but, under the circumstances of the relationships in question, did not abrogate the fundamental interests involved. The reason the father did not have a successful Equal Protection challenge in *Parham* was because he did not enjoy an interest considered fundamental and the classification bore a valid relationship to the purpose of the wrongful death statute since he did not have a relationship which the statute was designed to protect in the first instance.

Finally, the Court of Appeal is in conflict with *Weber* and other decisions of this Court concerning when strict scrutiny should be applied. The strict scrutiny applied in *Weber* must be applied to any mother-child class excluded from the benefits of a wrongful death statute because the state cannot arbitrarily choose to protect the fundamental liberty interests of some but not others without, as *Weber* states, showing a compelling state interest. *Weber* is consistent with the other precedent of this Court. Once a state acts to protect the fundamental interests of some individuals, it must act evenhandedly and provide protection to all unless there is a compelling state interest promoted by the challenged classification. *Harper v. Virginia*, 383 U.S. 663, 670 (1966).

The Court of Appeal stated "Karen Alexander has not demonstrated how these statutes affect her relationship with her unborn child." 114 F.3d at 1407. This statement ignored *Weber*. *Levy* clearly stated that wrongful death statutes involve the important familial relationship, and *Weber* stated that for that reason exclusion under the statute requires a compelling interest.

The relationship of Karen and Kaylyn Alexander was involved in the same way the interest in familial relationships of the litigants in *Levy*, *Glona* and *Weber* were involved. Mrs. Alexander is denied Equal Protection of the laws because she does not receive the compensation designed to replace the loss of the relationship with damages awarded under the statute. Award of compensation for the loss of the relationship is a principal purpose of the wrongful death statute. *Green v. Bittner*, 424 A.2d 210 (N.J. 1980). It is precisely because the litigants in *Levy*, *Glona* and *Weber* were denied the opportunity to seek compensation that their rights were violated.

However, Mrs. Alexander is affected even more profoundly than the litigants in *Levy*, *Glona* and *Weber*. In those cases the lack of protection for mothers of illegitimates usually afforded by the deterrence effect of tort law was not lost to those litigants.

As this Court pointed out, tortfeasors could not know who was illegitimate and who was not. However, as the New Jersey Supreme Court pointed out in *Giardina*, in medical malpractice cases there is no deterrent effect of tort law were the child is in utero, and the law actually encourages a tortfeasor to allow an injured child to die in utero. See, *Carey v. Lovett*, 622 A.2d 1279, 1286-87 ("a requirement of contemporaneous observation could disserve both objectives by providing physicians with an incentive to anesthetize the woman"). This fear of encouragement holds a unique concern where it comes to patients still in utero in an age when physicians perform fetal surgery on children as early as seventeen weeks gestation (See, App., 85-86) and medical texts on fetal surgery contain chapters on perceived lack of legal rights of the child. Robertson, J.A. "Legal Considerations in Fetal Treatment" in *The Unborn Patient*, 2nd Ed., editted by M.R. Harrison , 19-24.

C. The Decision of the Court of Appeals is in Direct Conflict with *Levy*, *Glona* and *Weber* which hold that a State which Excludes some Mother's from the Benefits of a Wrongful Death Statute must have a Legitimate State Interest which bears a Relationship to the Purpose of the Wrongful Death Statute.

Although the Court of Appeals mentions that, in a traditional scrutiny case, a statute meets the requirements of Equal Protection" if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose," 114 F.3d at 1408, that Court does not identify a single interest of the State of New Jersey which justifies the disparity of treatment. 114 F.3d 1407-1408. This failure is in direct conflict with *Weber*, *Levy* and *Glona*, and all decisions of this Court dealing with Equal Protection jurisprudence. *Weber* made the rule of law plain:

> "The inferior classifications of (illegitimate children) bears, in this instance, no significant relationship to those recognized purposes of recovery which (wrongful death portion of) worker's compensation statutes commendably serve." *Weber*, 406 U.S. at 175.

Levy and *Glona*, in particular, stressed the need to demonstrate

how the disparity in treatment is justified by some interest of the state advanced by the classifications. Mrs. Alexander has litigated this case for three years and has clearly shown that there is *no* interest at all which supports the classification. Allowing the wrongdoer to act with impunity because his wrongful conduct operated to kill the child before birth could occur actually frustrates the very purpose for which the statute is created: [1] deter the killing of a child, and [2] compensate the mother for the loss of a relationship in which she enjoyes an interest protected as fundamental.

Mrs. Alexander demonstrated that New Jersey law is still burdened with the discriminatory classification because of a mistake. See discussion *supra* at 6-7; 13-15. A mistake of fact is not a basis which can be considered "rational" to discriminate against Mrs. Alexander. It is "irrational" and perfectly arbitary.

The Court of Appeals, not able to express a single interest of the state which relates to any legitimate state interest, recites that "the assumed legislative bases(sic) ... were discussed in *Giardina...*". *Giardina*, however, only stated that the explanation (not rational basis) for the existence of the classification was the mistake of fact the New Jersey Supreme Court corrected in *Smith v. Brennan*. See *supra*, 6-7; 13-15. There was no "basis", only a big mistake. The Court of Appeals states in its Due Process Section: "New Jersey has chosen to draw a bright line that eliminates the nearly impossible problems of proof inferred in such actions when injury to a fetus is at issue." 114 F.3d at 1406. This statement contradicts the reasoning of the New Jersey Supreme Court which has stated that there exist no such problems of proof on numerous occasions. Giardina, at 147; *Smith v. Brennan*, 157 A.2d at 503. Even if the state claimed that it had such an interest in mind to justify the classification, which he does not, the fact that it permits the same proof in (1) prenatal injury cases generally, (2) live birth cases when the injury occurs in utero, and (3) *Portee* claims in stillbirth cases, show that this concern cannot constitute a legitimate reason or interest to justify discrimination against Mrs. Alexander. *Gomez v. Perez*, 409 U.S. 535, 538 (1973). Mrs. Alexander can certainly prove in state court that Kaylyn's death was due to the defendants' negligence. The State of New Jersey itself did an autopsy which established the cause of death, the causal relationship of which is routinely proven in fetal distress cases on an almost daily basis.

The decision of the Court of Appeals violates the plain mandate of *Weber*, *Glona* and *Levy*.[7]

II. THE HOLDING OF THE COURT OF APPEALS THAT THERE ARE HUMAN BEINGS WHO DO NOT HAVE EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT INCLUDING *LEVY V. LOUISIANA*, *PLYLER V. DOE*, AND *YICK WO V. HOPKINS*. THE INCORRECT INTERPRETATION OF THIS COURT'S DECISION IN *ROE V. WADE* BY THE COURT OF APPEALS CREATES A CONFLICT IN THE DECISIONAL LAW OF THIS COURT WHICH ONLY THIS COURT CAN AND SHOULD RESOLVE.

The Third Circuit accepted as true that Kaylyn Alexander and all children of her class are "complete, separate and irreplaceable human beings" who have actual relationships with their mothers and that Kaylyn and other children are capable of experiencing pain beginning at eight weeks gestation. 114 F.3d at 1401.

Despite these facts, The Court of Appeals decided that Kaylyn does not enjoy Equal Protection Rights because, it held, there are persons in fact who do not have Constitutional Rights.

> "The short answer to plaintiff's argument is that the issue is not whether the unborn are human beings, but whether the unborn are constitutional persons." 114 F.3d at 1402.

In support of this proposition the Court of Appeals cited no decision of this Court but relied upon a law review article. This Court stated in *Roe v. Wade*, 440 U.S. 113, 159 in 1973 that it could not determine when the life of a child began and that this Court at that "point in the development of man's knolwedge, [was] not in a position to speculate as to the answer". The Court of Appeals interpreted *Roe* to mean that this Court has held that there are human beings (persons in fact) who have no Equal Protection

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[7]Under New Jersey Law it is clear that a declaration that the statute violates the Equal Protection Rights of Mrs. Alexander would result in the New Jersey Courts continuing to allow wrongful death recoveries, it would just apply the law in a manner consistent with this Court's mandate. *Right to Choose v. Byrne*, 91 N.J. 287, 311-312 (1982).

Rights. In reaching that interpretation of *Roe*, it ignored the plain language of this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968), *Plyler v. Doe*, 457 U.S. 202 (1982) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1885) all of which were thoroughly briefed below.

The obvious injustice of the statement prompted a concurring opinion, although in agreement with the result in this case, which expressed alarm at the harsh implications of such a holding:

> "...the Court's suggestion that there could be 'human beings' who are not 'constitutional persons' is unfortunate.

A. The Decision of the Court of Appeals Denying Equal Protection Rights to Kaylyn Alexander Conflicts With the Court's Decision in *Levy*, and the principles set forth in *Plyler* and *Yick Wo*.

The Equal Protection Clause of the Fourteenth Amendment protects *every* living human being, without exception. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968). It would be an inherent contradiction to argue that the equal protection clause could itself contain a classification which withholds its protection of equality from anyone. *Plyler v. Doe*, 457 U.S. 202, 213 (1982). To be protected by the clause this Court has stated individuals need only: [1] [be] "human", [2] be "alive", and [3] "have being". *Levy*, 391 U.S. at 70. One need only be a "living human being".

The child's right to the equal protection of the laws is implicated and violated by the wrongful death and survival action statutes. Karen Alexander, as mother of Kaylyn, possesses the standing to litigate Kaylyn's equal protection rights although she is deceased. *Califano v. Goldfarb*, 430 U.S. 199, 206-208 (1977). There is obvious and critical importance to the finding of fact that Kaylyn Alexander is a human being.

This Court's holding in *Levy* is consistent with [1] the understanding of the drafters of the Fourteenth Amendment; and [2] the controlling principles of the Equal Protection Clause itself. Numerous statements show the basic assumption of the framers that "in the eyes of the Constitution, every *human being* within its sphere...from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added). It is clear that the framers of the Amendment intended the Due Process Clause to be coextensive with the total class of all humanity, as a constitutional codification of the natural and

inalienable rights. John Bingham, the author of section 1 of the Fourteenth Amendment, clearly equated the word "person" with "human being", using the terms interchangeably:

> The provision of our Constitution is, "no person shall be deprived of life, or liberty, or property without due process of law."...this new Magna Carta to mankind declares the rights of all to life and liberty and property; that *no person* ...shall be deprived of life or liberty or property without due process of law. ...I would pass the bill, not only for the sake of giving present relief to the unfortunate *human beings* for whose special relief it is designed but I would pass this bill for the purpose as well of giving assurance...that no man shall ever, in the coming future,...be deprived of his life, of his liberty, or his property without due process of law. Cong. Globe, 37th Cong. 2d Sess. (April 11, 1862) 1683-1690. Similiar Bingham Statements at Cong. Globe, 35th Cong. 2d Sess. 983 (1859); Cong. Globe, 37th Cong. 2d Sess. 1638 (1862); See also, Cong. Globe, 40th Cong., 1st Sess. 542 (1869); Cong. Globe, 35th Cong. 1st Sess. app. 65-66 (1858). [Emphasis added].

Natural and inalienable rights and the right to life itself are not derived from government but from the fact of the individual's existence, and the interest that each possesses in life. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1886); Constitution of the United States of America: Analysis and Interpretation, Killian, J. et al., ed. (1987), at p. 1623; Arkes, H. *Beyond the Constitution*, Prin. Univ. Press (1990). The essence of these rights themselves prohibit denial by classification or deprivation of its inherent value. The Declaration of Independence states that man's 'unalienable' right to life is a 'self-evident truth', and the purpose of our government is to protect the natural rights of people. This understanding was shared by both the founding fathers and the framers of the Fourteenth Amendment, the embodiment of this inspiration. *The Works of James Wilson*, Ed. by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vo. I & II p.314-335.

Thus, the fundamental purpose of section one of the 14th Amendment Due Process Clause was the protection of natural rights, and the clause was a "confirmatory reference" to the pre-existing "affirmative duty of government to protect [persons] in

their natural rights." And the Equal Protection Clause guaranting equality of protection was a modifying condition. Because of the "inalienable" and "natural" character of the Due Process rights, Bingham and the other framers of the Fourteenth Amendment created the clause for the purpose of reaffirming them as rights beyond the reach of government to withhold from any class of human beings. Jacobus tenBroek, *The Anti-Slavery Origins of the Fourteenth Amendment* (1931) 219-221. See also *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1885).

Levy's holding that all living human beings are protected by the Equal Protection Clause is supported by the logic that if the clause were to be interpreted to exclude any class of human beings, that interpretation would undermine the purpose of the clause.

> "To permit a state [to interpret the Equal Protection Clause] in order to identify subclasses of persons whom it would define as beyond its jurisdictions, thereby relieving itself of the obligations to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment." *Plyler v. Doe*, 457 U.S. 202, 213 (1982) (citing John Bingham's comments that show that the class covered by equal protection was intended to be co-extensive with all humanity. 457 U.S. at 214-215).

B. The Court of Appeals Interpreted This Court's Decision in *Roe v. Wade* to Mean There Can Be Human Beings Who Have No Equal Protection Rights. Incorrect Interpretation of *Roe* By the Court of Appeals Creates a Conflict in the Decisional Law of This Court Which only This Court Can, and Should, Resolve.

When the Court of Appeals held that there can be human beings who have no Equal Protection Rights, it did so in reliance upon this Court's statement in *Roe v. Wade*, 410 U.S. 113, 158 (1973) that the Fourteenth Amendment does not "include the unborn." 114 F.3d at 1400. The entire basis for this statement in *Roe* was this Court's conclusion that in 1973 it was not able to determine when the life of a human being began:

> We need not resolve the difficult question of when life by...the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer 410 U.S. at

159 (emphasis added).

Roe simply ruled that in 1973 it could not determine when the life of the human being began. *Roe* reserved the answer to that question for a later court when "man's knowledge" is sufficient. In the absence of such a finding of fact the court found no independent basis to support the conclusion that the "fetus" enjoyed rights regardless of the fact that it could not be determined to be a human being. Nor did *Roe* rule that there *are human beings who are not* protected by the Equal Protection Clause. To do so would have required a legal discussion in which the court did not engage and required an overruling of *Levy v. Louisiana, supra* and *Yick Wo v. Hopkins,* 118 U.S. 356 (1885) which the court did not provide. *Levy* made it clear that no human being is to be excluded from equal protection.

Ultimately whether Kaylyn possesses rights under the Equal Protection Clause is a mixed question of fact and law. The rule of law is clear. Under *Levy* all living human beings are protected. 391 U.S. at 70. In 1973 the *Roe* court felt that the fact of whether the child is a living human being before birth could not be definitively decided. The *Levy* and *Roe* cases are reconciled by a determination of fact. Relevant is the statement of Justice Brandeis in *Burnet v. Coronado Oil and Gas Co.*,[8] 285 U.S. 393, 405-413 that a new appreciation of facts not previously understood will change the outcome for Equal Protection rulings even though the legal principles remain unchanged:

> The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute;...In every such case the decision...is dependent upon the determination of...a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character. 285 U.S. at 410-411.

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[8]The Brandeis opinion has been frequently cited with approval. See *Solario v. U.S.*, 483 U.S. 435, 450 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

Whether Kaylyn possesses equal protection rights is precisely such a mixed question of fact and law. The question of fact is now beyond dispute because of the development of technology, medical advances and knowledge which did not exist in 1973. (See A75-102). If there is a principle of law which justifies withholding Equal Protection Rights to Kaylyn, such that third parties can tortiously kill the child with impunity, such a principle has never been espoused by this Court.

The inference that the *Roe* Court itself was not in disagreement with the *Levy* holding is compelled by the fact that *Roe* never once mentioned *Levy*, or expressed disagreement with it. It is inconceivable that the *Roe* Court intended to suggest that there are human beings who possess no constitutional rights without [1] expressly stating such a holding; [2] addressing *Levy* and overruling it; [3] specifically addressing the entire body of law which requires government to protect the lives of all human beings; [4] addressing its own prior rulings, such as *Yick Wo v. Hopkins*, 118 U.S. 356 (1885), which holds that the right to live is possessed by human beings independent of the constitution; and [5] reconciling a constitution which fails to provide equal protection to some human beings, while providing protection for corporations [see, e.g. *Grosjean v. American Pres Co.*, 297 U.S. 233 (1936)].

With respect to Kaylyn Alexander, whose rights are raised, there is no doubt she is a person, a human being, in fact. The State of New Jersey performed an autopsy, found a cause of death of her person, and issued a death certificate in her name. It is obvious that this case presents an important constitutional question that only this Court can, and must, resolve.

The Petition in this case should be granted because the statement of the Court of Appeals that there are human beings without Constitutional Rights is in conflict with the decisions of this Court and as the concurring opinion suggests if the holding that there can be human beings who are "non-Constitutional" persons is left to stand it is capable of perpetuating great injustice and cannot be permitted to influence the development of Constitutional Law in the future.

HAROLD J. CASSIDY, ESQ.

Appendix A

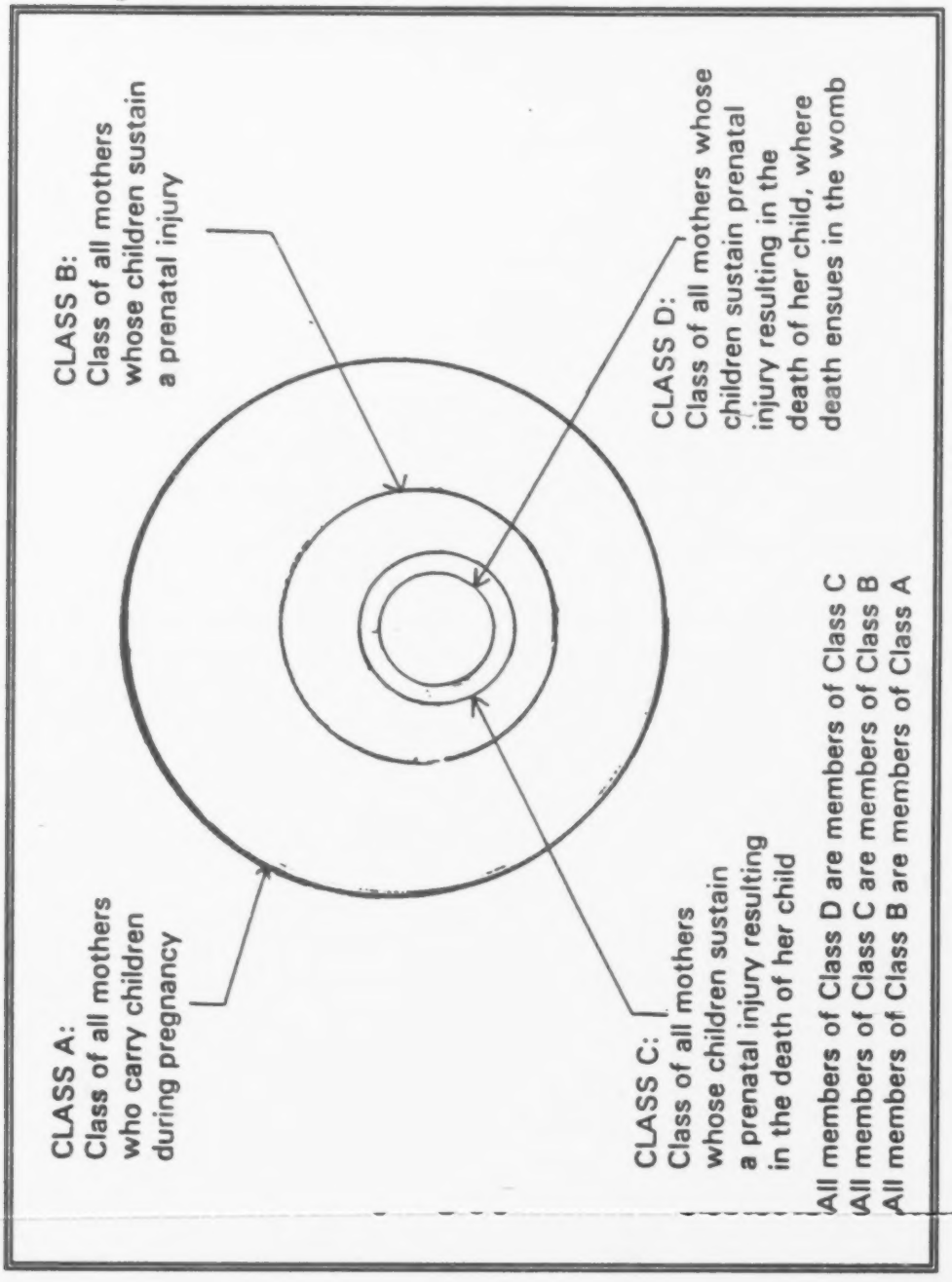
A chart depicting New Jersey claims for prenatal injuries which result in the child's death excerpted from a portion of the Brief filed with the U.S. Court of Appeals for the Third Circuit.

CLAIMS RECOGNIZED UNDER NEW JERSEY LAW FOR PRENATAL INJURIES TO A CHILD WHICH RESULTS IN THE CHILD'S DEATH

NATURE OF CLAIM	SOURCE OF CLAIM	INTERESTS PROTECTED	NATURE OF DAMAGES	CLAIMS RECOGNIZED WHERE CHILD'S PRENATAL INJURIES RESULT IN THE DEATH OF THE CHILD	
				DEATH ENSUES AFTER BIRTH	DEATH ENSUES BEFORE BIRTH
WRONGFUL DEATH	Derived from the relationship of mother and child	Mother's relationship with her child and the child's life	Pecuniary losses resultant from he loss of companionship with child	Yes	No
SURVIVAL ACTION	Derived from the relationship of mother and child	Child's health and life	Money damages for injury to child while alive	Yes	No
PORTEE CLAIM	Derived from the relationship of mother and child	Mother's health	Money damages for emotional distress of mother due to "loss of a loved one"	Yes	Yes

Appendix B

A chart excerpted from portion of Brief filed below depicting relationship of excluded class to classes given claim.



Appendix C

A List of the majority of States which permit wrongful death claims in "stillbirth cases"

I. Thirty-seven states and the District of Columbia now permit wrongful death claim in "stillbirth" cases. These include 1) Alabama - *Eich v. Gulf Shores*, 300 So.2d 354 (Ala. 1974); 2) Arizona - *Summerfied v. Superior Court*, 698 P.2d 712 (Ariz. Sup. Ct. 1985); *3) Colorado - Espadero v. Feld*, 649 F.Supp. 1480 (D. Colo. 1986); *Rottman v. Krabloonik, Inc.*, 834 F.Supp. 1269 (D. Colo. 1993); 4) Connecticut - *Gorke v. Leclerc*, 181 A.2d 448 (Conn. 1955); *5) Delaware - Worgan v. Greggo & Ferraro, Inc.*, 128 A.2d 557 (Del. Sup. Ct. 1956); *Luff v. Hawkins*, 551 A.2d 437, 438 n.1 (Del. Sup. Ct. 1988); *6) Washington D.C. - Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394, 396 & n.2 (D.C. Ct. App. 1984); *7) Georgia - Porter v. Lassiter*, 87 S.E.2d 100 (Ga. App. 1990); *Wade v. United States*, 745 F.Supp. 1573 (D. Haw. 1990); 8) Idaho - *Volk v. Baldazo*, 651 P.2d 11, 13 (Idaho 1982); *9) Illinois - Chrisafogerorgis v. Brandenberg*, 304 N.E.2d 88 (Ill. 1973); 10) Indiana - *Britt v. Sears*, 277 N.E.2d 20 (Ind. App. 1971); *11) Kansas - Hale v. Manion*, 368 P.2d 1 (Kan. 1962); *12) Kentucky - Mitchell v. Couch*, 285 S.W.2d 901 (Ky 1955); 13) Louisiana - *Danos v. St. Pierre*, 402 So.2d 633 (La. 1981); *State ex rel. Odham v. Sherman*, 198 A.2d 71 (1964); 14) Massachusetts - *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975); *15) Michigan - O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971); *Jarvis v. Providence Hospital*, 444 N.W.2d 236, 238 (Mich. App. 1989); 16) Minnesota - *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949); *17) Mississippee - Rainey v.Horn*, 72 So.2d 434 (Miss. 1954); 18) Montana - *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *Strzelczyk v. Jett*, 870 P.2d 730 (Mont. 1994); 19) Nevada - *White v. Yup*, 458 P.2d 617, 620-621 (Nev. 1969); 20) New Hampshire - *Polinquin v. MacDonald*, 135 A.2d 249 (N.H. 1957); *21) New Mexico - Salaza v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. Ct. App. 1980); *22) North Carolina -*

DiDonato v. Wortman, 358 S.E.2d 489 (N.C. 1987), *reh'g den.*, 361 S.E.2d 73 (1987); *23) North Dakota - Hopkins v. McBane*, 359 N.W.2d 862, 864 (N.D. 1985); 24) Ohio - *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985); 25) Oklahoma - *Evans v. Olson*, 550 P.2d 924, 927 (Okla. 1976); *26) Oregon - Libbee v. Permanente Clinic*, 518 P.2d 636 (Or. 1974), *reh'g den.*, 520 P.2d 361 (1974); 27) Pennsylvania - *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985); *Presley v. Newport Hospital*, 365 A.2d 748 (R.I. 1976); *28) South Carolina - Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964); *Re Certification of Question of Law from United States District Court*, 387 N.W.2d 42 (S.D. 1986); 29) Tennessee - Tenn. Code Ann. §20-5-106(c) (Supp. 1991) (legislatively overruling *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977); 30) Vermont - *Vaillancount v. Med. Center Hosp. of Vermont*, Inc., 425 A.2d 92, 94-95 (Vt. 1980); *31) Washington - Moen v. Hanson*, 537 P.2d 266 (Wash. 1975); *32) West Virginia - Baldwin v. Butcher*, 184 S.E.2d 428; 431-32 (W. Va. 1971); *Farley v. Sartin*, 466 S.E.2d 522 (W. Va. 1995); 33) Wisconsin - *Kwaterski v. State Farm*, 148 N.W. 2d 107, 109 (Wis. 1967).

II. The modern trend for the states to recognize the wrongful death claims in stillbirth cases even for stillbirths prior to viability has extended to 1) West Viriginia - *Farley v. Sartin*, 466 S.E.2d 522 (W. Va. Dec. 15, 1995)(interpreting statute to provide claims for death of children throughout pregnancy).; *2) Georgia - Porter v. Lassiter*, 87 S.E.2d 100 (Ga. 1955) (quickening); 3) Illinois - Ill Comp. Stat., ch. 740, §180/2.2 (1992) (any time during pregnancy) (legislatively overruling *Green v. Smith*, 377 N.E.2d 37 (1978); see *Smith v. Mercy Hosp. and Medical Center*, 560 N.E.2d 1164 (1990) (viability of fetus not necessary to sustain wrongful death action); *4) Louisiana - Johnson v. Southern New Orleans Light & Traction Co.*, (La. App. Orl. Dec. 10, 1923) (rejecting viability standard for wrongful death of unborn child); *Danos v. St. Pierre*, 402 So.2d 633, 639 (La. 1981) (Approving Johnson's rejection of viability); *Danos v. St. Pierre*, 383 So.2d 1019, 1027 (La. App. 1980); aff'd 402 So.2d 633 (La. 1991) (Lottinger, J. concurring); 5) Missouri -*Conner v. Monkem*, 898 S.W.2d 89 (Mo. 1995) (interpreting statute setting forth rule of construction); *6) South Dakota - S.D. Code Laws Ann.*, §21-5-1 (1987) (amending wrongful death statute to include "an unborn child" for total period of gestation); *Re Certification of a Question of Law from the*

United States District Court, __ N.W.2d __ (Docket No. 19017) (Feb. 15, 1996)(interpreting statute to allow wrongful death action at any stage of pregnancy).

III. In addition, the modern trend among the states is to ignore "viability" as relevant to claims for prenatal torts. Twenty eight states that have expressly or impliedly rejected "viability" as relevant to prenatal injuries are: [1] Alabama [*Wolfe v. Isbell,* 280 So. 2d 758, 761 (Ala. 1973) (express statment in context of wrongful death action)] [2] Arizona [*Walker by Pizano v. Mart.* 790 P.2d 735, 739 (Ariz. Ct. App. 1990) (*dictum* in wrongful life action)]; [3] California [*CAL. CIV. CODE*, sec. 29 (West 1982); *Keleman v. Superior Court,* 186 Cal. Rptr. 566, 568 (Ct. App. 1982) (prenatal injury); *Endo Laboratories, Inc. v. Hartford Ins. Group,* 747 F.2d 1264 (9th Cir. 1984) (applying California law)]; [4] Colorado [*Empire Cas. v. St. Paul Fire & Marine,* 764 P.2d 1191, 1195-97 (Colo. 1988) (by implication)]; [5] Connecticut [*Simon v. Mullin*, 3870 A.2d 1353, 1357 (Conn. 1977) (prenatal injury)]; [6] Florida [*Day v. Nationwide Mut. Ins. Co.*, 328 So. 2d 560, 562 (Fla. Dist. Ct. App. 1976) (prenatal injury)] [7] Georgia [*Hornbuckle v. Plantation Pipe Line Co.*, 93 S.E. 2d 727 (Ga. 1956) (prenatal injury)]; [8] Illinois [*Renslow v. Mennonite Hosp.* 367 N.E.2d 1250, 1252-53 (Ill. 1977) (express statement in recognizing cause of action for preconception tort)] [9] Indiana [*Cowe by Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind. Ct. App. 1989), *transfer granted*, 575 N.E.2d 630,636-37 (Ind. 1991) (pre-natal injury); [10] Kansas [*Humes v. Clinton*, 792 P.2d 1032, 1037 (Kan. 1990) (dictum)]; [11] Louisiana [*Danos v. St. Pierre*, 402 So.2d 633 (La. 1981) (by implication in wrongful death action)] [12] Maryland [*Group Health Ass'n, Inc. v. Blumenthal*, 453 A.2d 1198, 1206-07 (Md. 1983) (express statement)]; [13] Massachusetts [*Payton v. Abbott Laboratories*, 437 N.E.2d 171, 182-85 (Mass. 1982); *Torigian v. Watertown News Co.*, 225 N.E.2d 926 (Mass. 1967) by implication in wrongful death action) (prenatal injury)] [14] Michigan [*Womack v. Buchhorn,* 187 N.W.2d 218 (Mich. 1971) (prenatal injury)]; [15] Montana [*Bergstresser v. Mitchell,* 448 F. Supp. 10, 14-15 (E.D. Mo. 1977), *aff'd* 577 F.2d 22, 25-26 (8th Cir. 1978) (by implication in recognizing cause of action for pre-conception tort)]; *Miller v. Duhart*, 637 S.W.2d 183, 186 (Mo. Ct. App. 1982) (*dictum*)] [16] Nevada [*Weaks v. Mounter*, 493 P.2d 1307, 1309

(Nev. 1972) (prenatal injury); *White v. Yup*, 458 P.2d 617, 620-21 (Nev. 1969) (express statement in conext of wrongful death action)]; [17] New Hampshire [*Bennett v. Hymers*, 147 A.2d 108 (N.H. 1958) (prenatal injury)]; [18] New Jersey [*Smith v. Brennan*, 167 A.2d 497, 502 (N.J. 1960) (prenatal injury)]; [19] New York [*Kelly v. Gregory*, 125 N.Y.S.2d 696, 697 (N.Y. App. Div. 1953) (prenatal injury)]; *Hughson v. St. Francis Hosp. of Port Jervis*, 459 N.Y.S.2d 814, 815 (N.Y. App. Div. 1983) (same)]; [20] North Carolina [*Stetson v. Easerling*, 161 W.E.2d 531, 533-34 (N.C. 1968) (express statement in context of wrongful death action)]; [21] North Dakota [*Hopkins v. McBane*, 359 N.W.2d 862, 864 (N.D. 1985) (adopting sec. 869(1) of the *RESTATEMENT (SECOND) OF TORTS* (1979)]; [22] Oklahoma [*Evans v. Olson*, 550 P.2d 924, 927 (Okal. 1976) (express statement in context of wrongful death action)]; [23] Pennsylvania [*Sinkler v. Kneale*, 164 A.2d 93, 96 (Pa. 1960) (prenatal injury)]; [24] Rhode Island [*Sylvia v. Gobeille*, 220 A.2d 22 (R.I. 1966) (prenatal injury)]; [25] Texas [*Delgado v. Yandell*, 468 S.W.2d 475 (Tex. Crim. App. 1971), *writ re'd n.r.e. per curiam*, 471 S.W.2d 569 (Tex. 1971) (prenatal injury)]; [26] Virginia [*Kalafut v. Gruver*, 389 S.E. 2d 681, 683-84 (Va. 1990) (adopting sec. 869(1) of the *RESTATEMENT (SECOND) OF TORTS*)]; [27] Washington [*Seattle-First National Bank v. Rankin*, 367 P.2d 835, 837-38 (Wash. 1962) (prenatal injury); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483,495 (Wash. 1983) (*dictum* in wrongful life case)]; [28] Wisconsin [*Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W.2d 107, 109 (Wis. 1967) (express statement in context of wrongful death action), *overruled on other grounds*; *Puhl v. Milwaukee Auto. Ins. Co.*, 99 N.W.2d 163, 169-71 (Wis. 1959) (*dictum*); *In re Estate of Stromsten*, 299 N.W. 2d 226 (Wis. 1980)].

IV. Eleven states recognize claims for prenatal injuries after "viability" but have not determined, one way or the other, whether "pre-viability" injuries are actionable: [1] Delaware [*Worgan v. Greggo & Ferrara, Inc.* 128 A.2d 557 (Del. Super. Ct. 1956) (express staement in context of wrongful death action); *Luff v. Hawkins*, 551 A.2d 437, n.l (Del. Super. Ct. 1988) (express statement); [2] District of Columbia [*Greater Southeast Community Hosptial v. Williams*, 482 A.2d 394, 396 & n.2 (D.C. 1984) (express statement)]; [3] Idaho [*Volk v. Baldazo*, 651 P.2d 11, 13 (Idaho 1982) (express statement)] [4] Kentucky [*Mitchell v. Couch*,

285 S.W.2d 901 (Ky. 1955) (by implication in wrongful death action)]; [5] Minnesota [*Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949) (by implication in wrongful death action)]; [5] Mississippi [*Rainey v. Horn*, 72 So.2d 434 (Miss. 1954) (express statement in wrongful death action)]; [6] New Mexico [*Davila v. Bodelson*, 704 P.2d 1119 (N.M. Ct. App. 1985) (prenatal injury)]; [7] Ohio [*Williams v. Marion Rapid Transit, Inc.*, 87 N.E.2d 334 (Ohio 1949) (prenatal injury)]; [8] Oregon [*Mallison v. Pomeroy*, 291 P.2d 225 (Or. 1955) (prenatal injury)]; [8] South Carolina [*Hall v. Murphy*, 113 S.E.2d 790 (S.C. 1960) (express statement in context of wrongful death action); [9] Tennessee [*Shousha v. Matthews Drivurself Service, Inc.*, 358 S.W.2d 471, 476 (Tenn. 1962) (express statement)]; [10] Vermont [*Vaillancourt v. Medical Center Hospital of Vermont, Inc.*, 425 A.2d 92, 94-95 (Vt. 1980) (by implication in wrongful death action)] [11] West Virginia [*Baldwin v. Butcher*, 184 S.E.2d 428, 431-32 (W. Va. 1971) (express statement in context of wrongful death action)].

V. The other eleven states appear to have never reached a decision concerning whether prenatal injuries are actionable. There are no reported prenatal injury cases in Alaska, Arkansas [but see *Graham v. Sisco*, 449 S.W.2d 949 (Ark. 1970) (recognizing action for injuries inflicted in course of Caesarean section)), Iowa [(see *Weitl v. Moes*, 311 N.W.2d 259, 272 n.8 (Iowa 1981); but see *Kilker by and through Kilker v. Mulry*, 437 N.W.2d 1,2 (Iowa Ct. App. 1988) (apparently recognizing existence of cause of action for prenatal injuries); *Oswald v. LeGrand*, 453 N.W. 2d 634 (Iowa 1990); *Lamber v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985)]; Hawaii, Maine, Montana [(see *Kuhnke v. Fisher*, 683 P.2d 916, 919 (Mont. 1984)], Nebraska [see *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 220, 232 (Neb. 1951); but see *Miles v. Box Butte County*, 489 N.W.2d 829 (Neb. 1992) (affirming substantial damage award for prenatal injuries sustained shortly before delivery)); South Dakota (see *In re Certification of Questions of Law from United States District Court*, 387 N.W.2d 42, 45 (S.D. 1986), Utah, or Wyoming.

VI. Other than New Jersey there are nine state which do not allow wrongful death claims for children who are stillborn. There are: [1] California, *Justus v. Atchinson*, 565 P.2d 122 (Cal. 1977); [2] Florida, *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695

(Fla. 1968); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Simon v. United States*, 438 F. Supp. 759, 761 (S.D. Fla. 1977) (applying Florida law); [3] Iowa, *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971); [4] Maine, *Milton v. Cary Medical Ctr.*, 538 A.2d 252 (Me. 1988); [5] Montana, *Kuhnke v. Fisher*, 683 P.2d 916 (Mont. 1984); [6] Nebraska, *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 229 (Neb. 1951); *Egbert v. Wenzl*, 260 N.W.2d 480 (Neb. 1977); *Smith v. Columbus Community Hosp., Inc.*, 387 N.W.2d 490 (Neb. 1986); [7] New York, *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969); [8] Texas, *Witty v. American Gen. Capital Distribs., Inc.*, 727 S.W.2d 503 (Tex. 1987); [9] Virginia, *Lawrence v. Craven Tire Co.*, 169 S.E.2d 440 (Va. 1969).

FILED

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No. 97 OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KAREN F. ALEXANDER

Petitioner,

- against -

CHRISTINE TODD WHITMAN; et al.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Harold J. Cassidy, Esq.
P. O. Box 280
225 Broad Street
Red Bank, New Jersey 07701
(732) 530-9779

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Filed May 23, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5414

KAREN ALEXANDER; DENNIS DRAZIN, ESQ.;
DRAZIN AND WARSHAW,

v.

CHRISTINE TODD WHITMAN; PETER VERNIERO;[1]
JANICE S. MATHIS; STEPHEN R. ROTHMAN; ELTON A.
CONDA; W. ROBERT HENTGES; HARRY A. FREITAG, JR.;
MARIA VIZCARRONDO-DE SOTO; DONALD H. WAGNER;
DONALD W. DE LEO; SUSAN HOFFMAN GREENE;
CAROL OSWALD; KEVIN J. HOAGLAND; MARIE S.
MUHLER; *JOHN PECORARO; FRANKLIN V. FISHER;
ROSALIE MASSERI; GENEVA B. WOOD; VERNON A.
NOBLE; NANCY FITZGIBBONS; ANN P. CONTI; ALBERT J.
RUH; MARIA BARNABY GREENWALD

Karen Alexander, individually and on behalf of all persons similarly situated; Dennis Drazin, Esq., individually and on behalf of all attorneys similarly situated; and Drazin & Warshaw, a professional corporation, individually and on

---

[1]Deborah T. Poritz was the Attorney General for the State of New Jersey when this suit was instituted. Since that time, Deborah T. Poritz resigned as Attorney General and was appointed Chief Justice of the Supreme Court of New Jersey. Subsequently, Peter Verniero was appointed the Attorney General. Pursuant to Fed. R. App. Proc. 43(c), Peter Verniero is automatically substituted as a party plaintiff for Deborah T. Poritz.

behalf of all firms similarly situated,

Appellant

*Caption amended per the Clerk's order of 10/25/95

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(Civil No. 94-5229)

Argued: May 9, 1996

Before: GREENBERG, ALITO and McKEE, *Circuit Judges*

(Opinion filed: May 23, 1997)

HAROLD J. CASSIDY, ESQ. (Argued)
GREGORY R. MILNE, ESQ.
Cassidy, Foss & San Filippo
225 Broad Street
P.O. Box 896
Red Bank, NJ 07701

Attorneys for Appellants

PETER VERNIERO, ESQ.
Attorney General
JEFFREY J. MILLER, ESQ. (Argued)
ANDREA M. SILKOWITZ, ESQ.
Assistant Attorneys General
Richard J. Hughes Justice Complex
CN-112
Trenton, NJ 08625

Attorneys for Appellees, Christine Todd Whitman and Peter Verniero

RONALD KEVITZ, ESQ.
Morris County Counsel
W. RANDALL BUSH, ESQ. (Argued)
First Assistant Counsel
Administration and Records Building
CN 900
Morristown, NJ 07963

Attorneys for Appellee, John Pecoraro

ROBERT E. MARGULIES, ESQ.
Marguiles, Wind, Herrington & Knopf
15 Exchange Place
Suite 510
Jersey City, NJ 07302

Attorneys for Amicus Curiae,
Andrea Guillian and Marilyn Gotay

RICHARD F. COLLIER, JR., ESQ.
Collier, Jacob & Mills
580 Howard Avenue
Corporate Park III
Somerset, NJ 08873

Attorney for Amicus Curiae,
The World Federation of Doctors Who Respect Life

PAUL E. NEWELL, ESQ.
Newell & Adubato
80 Court Street
Freehold, NJ 07728

Attorneys for Amicus Curiae,
Association of Trial Lawyers of America - New Jersey

OPINION OF THE COURT

McKEE, *Circuit Judge*

Karen Alexander, Dennis Drazin, Esq., and the law firm of Drazin and Warshaw, P.C., appeal from the district court's dismissal of their complaint under Fed. R. Civ. P. 12(b)(6). Plaintiffs had alleged that New Jersey's Wrongful Death Act, N.J.S.A. 2A:31-1 *et seq.*, and Survival Action Act., N.J.S.A. 2A:15-3, violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution because they deny a cause of action to the statutory beneficiaries unless a fetus survives past birth. For the reasons that follow, we disagree and will affirm the district court's dismissal of the complaint.

I. FACTS

On July 15, 1992, Karen F. Alexander, who was then eight and one-half months pregnant, was admitted to the Jersey Shore Medical Center to give birth to her child. The vital signs of Ms. Alexander's baby were taken only fourteen minutes prior to delivery by cesarean section, and the fetus appeared normal and healthy. Tragically, however, the child was stillborn.[2]

An autopsy was performed, and a death certificate was issued showing the date of the child's birth as July 15, 1992. The birth certificate noted the child's name was Kaylyn Elissa Alexander and that she was "stillborn" due to "cardio-vascular collapse."

On July 13, 1994, Karen Alexander filed a complaint in the Superior Court of Monmouth County, New Jersey, seeking

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[2]In plaintiffs' motion for summary judgment states that the child died "while she was still in her mother's womb and before her actual birth, and was therefore declared 'stillborn'." Joint Appendix, at 37. The hospital's records state that the child had "interpartum demise." *Id.*

damages individually[3] and in her capacity as Administratrix *Ad Prosequendum* of the Estate of Kaylyn Elissa Alexander, Deceased, under the New Jersey Wrongful Death Act., N.J.S.A. 2A:31-1, and as General Administrator of the Estate of Kaylyn Elissa Alexander, Deceased, under the New Jersey Survival Action statute, N.J.S.A. 2A:15-3. The complaint alleged that the negligence of doctors, nurses, and other health care personnel at Jersey Shore Medical Center had injured Ms. Alexander's baby while it was still in her mother's womb. Ms. Alexander requested that the Surrogate of Monmouth County issue Letters of Administration *Ad Prosequendum* and General Letters of Administration for the Estate of Kaylyn Elissa Alexander. On October 18 and 31, 1994, the Surrogate denied the request for Letters *Ad Prosequendum* because Kaylyn Elissa had been stillborn.

On October 28, 1994, Karen Alexander and Dennis Drazin, a New Jersey lawyer, and Drazin & Warshaw, P.C., a law firm, filed a class action complaint under 42 U.S.C. §1983 in the United States District Court for the District of New Jersey. The suit named Christine Todd Whitman, individually, and as Governor of the State of New Jersey, Deborah T. Poritz, individually, and as Attorney General of the State of New Jersey,[4] and the Surrogates of all twenty-one counties in New Jersey as defendants. Alexander brought the action individually, on behalf of all mothers whose fetuses had allegedly been injured in utero by the tortious acts of a third party and who were later stillborn, on behalf of her own stillborn child, and on behalf of all stillborn children who were similarly situated. The complaint alleged violations of the Equal Protection and Due Process clauses of the Fourteenth Amendment. Essentially, the complaint alleged the New Jersey Wrongful Death Act (as interpreted by the New Jersey Supreme Court in *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988), and the New Jersey

---

[3]In the state court action, Karen Alexander seeks recovery in her individual capacity for the emotional distress and mental suffering which resulted from the stillbirth allegedly caused by the medical malpractice of the defendants.

[4]*See* n.1, *supra*.

Survival Action Act are unconstitutional because they deny recovery on behalf of stillborn fetuses. Plaintiffs requested, *inter alia*, that these statutes be declared unconstitutional, an order directing the surrogate to issue letters of administration in the estate of Kaylyn Elissa Alexander to Karen Alexander, and money damages.

Drazin and Drazin & Warshaw, P.C., individually and on behalf of all attorneys and law firms (the "Drazin plaintiffs"), raised the same constitutional challenge to the statutes, and alleged that their constitutional rights are violated because they are precluded from bringing wrongful death and survival actions on behalf of potential clients whose children were stillborn because of the tortious acts of third parties.

On December 11, 1995, the Governor and the Attorney General (the "State defendants") filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). The Surrogates (the "County defendants") thereafter moved to join in the state defendants' 12(b)(6) motion. Plaintiffs then cross-moved for class certification and for summary judgment.

Subsequently, fifteen of the Surrogates executed Consent orders of Judgement.[5] Following argument, the district court granted the State defendants' motion to dismiss. Consequently, plaintiffs' motions for class certification and for summary judgment were denied. This appeal followed.[6]

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[5]By those Consent Orders, the fifteen Surrogates agreed not to file any further submissions opposing the factual and legal contentions of the plaintiffs and agreed to be bound by all future interlocutory and final orders of the district court. (112A-147A).

[6]Plaintiffs' section 1983 complaint sought money damages (Count V) and declaratory and injunctive relief (Counts I, II, III and IV). However, plaintiffs are not appealing the district court's dismissal of their complaint as it relates to their claim for money damages. *See* Notice of Appeal (Joint Appendix, at 148).

II. STANDARD OF REVIEW

We exercise plenary review over a district court's order dismissing a complaint under Fed. R. Civ. P. 12(b)(6). *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993). We must determine if plaintiff may be entitled to relief under any reasonable reading of the pleadings, *Holder v. City of Allentown*, 987 F.2d 188, 193 (3d Cir. 1993), assuming the truth of all the factual allegations in the complaint, *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F. 2d 1364, 1367 (3d Cir. 1992). A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).[7]

III. DISCUSSION

A. THE STATUTORY SCHEME

It is helpful to briefly discuss the two causes of action at issue in this dipute before proceeding with our analysis.

1. WRONGFUL DEATH ACTION.

The fundamental purpose of a wrongful death action is to compensate survivors for the pecuniary losses they suffer because of the tortious conduct of others. *Alfone v. Sarno*, 403 A.2d 9, 12 (N.J. Super. Ct. App. Div. 1979). This cause of action was not recognized at common law and is purely a creature of statute. *Schmoll v. Creecy*, 254 A.2d 525, 527 (N.J. 1969). New

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[7]Our standard of review on an appeal from a denial of summary judgment is plenary. *Waldorf v. Shuta*, 896 F.2d 723, 728 (3d Cir. 1990), and our review of class certification determinations is normally limited to whether the district court abused its discretion. *Lusardi v. Xerox Corp.*, 975 F.2d 964, 973 (3d Cir. 1992). However, because we find that the district court's dismissal of the complaint under Fed. R. Civ. P. 12(b)(6) was proper, we need not address the propriety of its denial of plaintiffs' motions for summary judgment and for class certification.

Jersey's Wrongful Death Act provides, in relevant part, as follows:

> When the death of a person is caused by a wrongful act, neglgect or default, such as would, if death had not ensued, have entitled the person inured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

N.J.S.A. 2A:31-1.

An award of damages in a wrongful death action "is not a matter of punishment for an errant defendant or of providing for decedent's next of kin to a greater extent than decedent himself would have been able, but is rather a replacement for that "which decedent would likely have provided and no more." *Hudgins v. Serrano*, 453 A.2d 218, 224 (N.J. App. Div, 1982). The amount of recovery is based upon the contributions, reduced to monetary terms, which the decedent might reasonably have been expected to make to his or her survivors. *Alfone*, 402 A.2d at 12. Damages are awarded for pecuniary loss only, and not for injury to feelings, mental suffering, or loss of society or companionship. *Id.* However, economic dependency is not the sole measure of the damages. Minor children may recover the pecuniary value of the loss of care, guidance and advice of a parent during their minority. *Id.* In addition, the wrongful death statute permits the award or hospital, medical and funeral expenses. N.J.S.A. 2A:31-5.

A wrongful death action is available when a child is killed by the tortious act of another.

> When parents sue for the wrongful death of a child, damages should not be limited to the well-known elements of pecuniary loss such as the loss of the value of the child's anticipated help with household chores, or the loss of anticipated direct financial contributions by the child, after he or she becomes a wage earner.... [I]n addition, the jury should be allowed, under appropriate circumstances, to

> award damages for the parents' loss of their child's companionship as they grow older, when it may be most needed and valuable, as well as the advice and guidance that often accompanies it.

Green v. Bittner, 424 A.2dd 210, 211 (N.J. 1980). However, damages for these additional items are confined to their pecuniary value, not including the value of the emotional loss. *Id.*

Damages for the wrongful death of an infant are likewise recoverable and, "like wrongful-death damages generally, are limited to economic matters[] [such as] . . . the pecuniary value of the child's help with household chores, the pecuniary value of the child's anticipated financial contributions, and the pecuniary value of the child's companionship . . . as the parents grow older." *Carey v. Lovett*, 622 A.2d 1279, 1291 (N.J. 1993) (citing *Green* 424 A.2d at 211). However, "[t]he problem in evaluating the economic value of a newborn's life is obvious. No one can know much, if anything, about the infant and his or her future economic worth. That difficulty, however, should not preclude any award. Some award is appropriate, even though the inferences, and estimate of damages, are based on uncertainties." *Carey*, 622 A.2d at 1291.

The particular aspect of New Jersey's wrongful death action that gives rise to the instant controversy arises from the holding in *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988). There, the New Jersey Supreme Court held that the New Jersey Wrongful Death Act does not permit recovery for damages attributable to the wrongful death of a fetus. However, even though the parents cannot recover for the death of a fetus in such cases, they can recover damages for their own injuries that result from the tortious conduct. "[M]edical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury, their emotional distress and mental suffering, for which they are entitled to recover compensatory damages." *Id.* at 139.

2. SURVIVAL ACTION

At common law, a right to bring an action in trespass was personal and died with the person. *Canino v. New York News,*

Inc. 475 A.2d 528, 529 (N.J. 1984). Accordingly, survival actions, like wrongful death actions, did not exist. *Soden v. Trenton and Mercer County Trust Co.*, 127 A. 558, 559 (N.J. 1925). Survival action statutes modify the common law rule and provide that the personal right of action in trespass survives to the personal right of action in trespass survives to the personal representative of the decedent's estate. *Id.*, at 559.

New Jersey's Survival Action statute provides as follows:

> Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living.
>
> In those actions based upon the wrongful act, neglect, or default of another, where death resulted from injuries for which the deceased would have had a cause of action if he had lived, the executor or administrator may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased.

N.J.S.A. 2A:15-3. A survival action "gives executors or administrators a right of action for tortious injury or damage to the deceased or his property incurred prior to death." *Alfone*, 403 A.2d at 13. The major item of damages in a survival action (aside from funeral and burial expenses) is recovery for the decedent's pain and suffering between the time of injury and the time of death. However, an award for pain and suffering is appropriate only for pain and suffering that is conscious. *Id.* Recovery is also permitted for "hedonic damages," i.e., loss of enjoyment of life. *Eyoma v. Falco*, 589 A.2d 653, 658 (N.J. Super. Ct., App. Div. 1991).

The court in *Giardina* did not address rights of recovery on behalf of stillborn children under New Jersey's survival action. However, the district court here found that "it is clear by the implications of the holding in *Giardina* and by the language of the survival action statute itself that the New Jersey Legislature did

not intend to provide the parents of unborn or stillborn fetuses with a statutory cause of action for survival." Dist. Ct. Op. at 13. neither party to this appeal disagrees with that portion of the district court's holding, and we will therefore assume that New Jersey's survival action, like the wrongful death action, is limited to situations where the fetus survives until after birth.

B. KAREN ALEXANDER'S CLAIM ON BEHALF OF HER CHILD AND ALL OTHER SIMILARLY SITUATED STILLBORN FETUSES.

Ms. Alexander asserts a claim under 42 U.S.C. § 1983 on behalf of her stillborn child, Kaylyn Elissa, and all stillborn children and fetuses, alleging that the exclusion of stillborn children and fetuses from the coverage of New Jersey's wrongful death and survival actions violates the United States Constitution. 42 U.S.C. §1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983. Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U .S. 137, 144. n.3 (1979).

Ms. Alexander's claim on behalf of her stillborn child is grounded in the Equal Protection Clause of the Fourteenth Amendment, which provides that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV, §1.[8] In essence, Ms. Alexander argues that her stillborn child was a "person" who is denied the equal protection of the law because, under New Jersey law, wrongful death and survival actions can be maintained on behalf of children who are injured prenatally, are born and then die as a result of the prenatal injury, whereas, under New Jersey law, wrongful death and survival actions cannot be maintained on behalf of stillborn children.

However, Ms. Alexander can only establish a claim on behalf of her child under the Fourteenth Amendment if her child (and others similarly situated) fall(s) within the protections afforded "persons[s]" as that term is used in the Fourteenth Amendment, and it is clear it does not. The Supreme Court has already decided that difficult question for us in *Roe v. Wade*, 410 U.S. 113, 158 (1973). There, the Court expressly held that "the word 'person,' as used in the Fourteenth Amendment does not include the unborn." The Court held that "person" has "application only postnatally." *Id.* at 157. That constitutional principle was more recently re-affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). There, Justice Stevens, writing separately from the joint opinion of Justices O'Connor, Kennedy and Souter, wrote that, as a matter of federal constitutional law, a fetus is a "developing organism that is not yet a 'person'" and "does not have what is sometimes described as a 'right to life.'" *Id.* at 913 (Stevens, J., concurring in part and dissenting in part). This principle "remains a fundamental premise of our constitutional law governing reproductive autonomy." *Id.* at 914. Since the unborn are not persons within the meaning of the Fourteenth Amendment, no claim alleging an equal protection violation can be brought on behalf of the stillborn child.[9]

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[8]Our discussion of the claim brought on behalf of the stillborn child assumes that Karen Alexander has standing to assert the claim.

[9]Because the unborn are not persons within the meaning of the Fourteenth Amendment, it follows that the unborn are not encompassed within the meaning of the term "person" or "citizen" for purposes of 42 U.S.C.

Of course, as noted above, our inquiry must accept all well pleaded facts as true and we note that the complaint avers that the stillborn child was a human being from the moment of conception.[10] However, even if that is established as a matter of fact, we must look to controlling law to determine what effect, if any, that fact has upon our analysis. Our inquiry is not a factual one. It is a legal one. The question is not whether a stillborn child is a human being from the moment of conception, but whether that unborn "human being" is included within the meaning of the "person" contained in the Fourteenth Amendment. That legal question was resolved over twenty-four years ago when the Supreme Court decided *Roe*. In fact, the Court there specifically differentiated between the factual inquiry into when life begins, and the legal issue of the scope of the Fourteenth Amendment. The Court stated:

> We need not resolve the difficult question of when life

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§1983. See *Reed v. Gardner*, 986 F.2d 1122, 1127-28 (7th Cir. 1993).

[10]In ¶40 of the complaint it is averred that:

> As a matter of fact a child at every age of gestation from conception to birth is a complete, separate and irreplaceable human being and the daughter of Karen F. Alexander and all mothers similarly situated are actual human beings who have relationships with their mothers carrying them. This relationship between these two separate, complete individual human beings is in actual existence throughout pregnancy. As a matter of fact, a child can experience pain beginning at eight weeks after conception up to the time of actual birth. As a matter of fact, Karen F. Alexander's baby daughter and all children similarly situated from ages eight weeks after conception experience pain and suffer during trauma or as a result of injury or the damage to bodily systems necessary for the continuance of the life of the child.

> begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

410 U.S. at 159. Thus, it is immaterial that the compliant pleads that a stillborn child is a human being from conception.

Plaintiffs' reliance upon the advances of medical technology is likewise beside the point. Plaintiffs contend that *Roe* was based in part upon limited medical and scientific knowledge and that technological advances since *Roe* was decided allow us to study human development from the molecular stage. In fact, plaintiffs claim that the *Roe* Court provided for an evolving jurisprudence to keep pace with the state of medicine and science when it wrote "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer" to the question of when human life begins. *See* Appellants' Brief, at 41-42. However, no advance in technology or science can authorize us to depart from well established legal precedent, and we do not believe the Supreme Court intended to grant a license to do so in *Roe*.

Similarly, plaintiffs' reliance on what they believe to be an essential underpinning of the New Jersey Supreme Court's decision in *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960), does not make the constitutional claim raised on behalf of the stillborn child a cognizable one. In *Brennan*, the New Jersey Supreme Court held that children who survive a prenatal injury can bring a cause of action in tort against the person who caused the prenatal injury.[11]

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[11] *Smith v. Brennan* overruled *Stemmer v. Kline*, 26 A.2d 489 (N.J. 1942), which did not allow a surviving child a cause of action in tort for prenatal injuries. *Stemmer v. Kline* declined to recognize a cause of action for prenatal injury based, in large part, upon *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52, Am.Rep. 242 (Sup. Jud. Ct. 1884), which was a wrongful death case where the child was apparently stillborn. *Dietrich* held that

The court explained its holding by noting that "[m]edical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body."[12] *Id.* at 502.

The plaintiffs attempt to leverage this language by arguing that the New Jersey Supreme Court has recognized as scientific fact that an unborn child is a human being from the moment of conception. However, even assuming the court has recognized

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Massachusetts' wrongful death statute was inapplicable to a fetus, based on its view that a child is part of its mother before birth and does not have a separate existence or personality.

[12]Perhaps realizing the import of its holding that a child is in existence from the moment of conception, the New Jersey Supreme Court qualified its language. The court wrote:

> The semantic argument whether an unborn child is a "person in being" seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what every one will concede to be a person in being. If in the meanwhile those processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being. And regardless of analogies to other areas of law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that rights, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.

Smith, 157 A.2d at 503.

this as fact, it does not follow that the court has also recognized the unborn child to be a "person" under the Fourteenth Amendment. Moreover, even if it had, it should be clear that no such holding could contravene or reverse the contrary holding of the United States' Supreme Court. Quite simply, a state cannot "declare a fetus a person" and thereby add "new persons to the constitutional population." Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 400. In addition, *Smith* was decided on common law principles and created a common law remedy for a surviving child harmed by a prenatal injury. No federal constitutional principles were implicated in that court's analysis.

The short answer to plaintiffs' argument is that the issue is not whether the unborn are human beings, but whether the unborn are constitutional persons.[13] It is beyond question that medical and scientific knowledge has advanced significantly since *Roe*. However, even with those advances, the Supreme Court has consistently adhered to *Roe*'s holding that the unborn are not person under the Fourteenth Amendment. See *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 855-61. Therefore, plaintiffs' argument that *Roe* was based on imperfect science is to no avail.[14]

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[13]The phrase "constitutional person" is Ronald Dworkin's. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*. 59 U. CHI. L. REV. 381, 398.

[14]Interestingly, Justice O'Connor, writing for the Court in *Planned Parenthood v. Casey*, clearly acknowledged the advances in medical knowledge since *Roe*. She wrote:

> "We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier. But these facts go only to

Accordingly, the district court properly granted a 12(b)(6) dismissal of the equal protection claim raised on behalf of the stillborn child.

C. KAREN ALEXANDER'S CLAIM ON BEHALF OF HERSELF AND OTHER SIMILARLY SITUATED MOTHERS

Besides asserting a claim on behalf of her stillborn child, Karen Alexander asserts a claim on her own behalf and on behalf of all mothers whose children were stillborn because of the tortious conduct of others. She claims that her interest in her relationship with her unborn child during pregnancy is a fundamental interest protected by the United States Constitution and that the challenged statutes violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

1. THE DUE PROCESS CLAIM.

The Due Process Clause not only requires that the government follow appropriate procedures when it seeks to "deprive any person of life, liberty or property," it also prevents "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Thus, the Due Process Clause has a substantive component which guarantees that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 847 (quoting *Whitney v. California*, 274 U.S. 357, 373

> the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.

Planned Parenthood, 505 U.S. at 860 (citations omitted).

(1927)(Brandeis, J., concurring).

Although the "outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects" have not been defined, *Id.*, at 848, certain protected liberties fall within the ambit of protection. Thus, those to whom the Amendment applies have a right to be free

> from bodily restraint but also the right . . . to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [their] own conscience[s], and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Board of Regents. v. Roth, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

In addition, the Constitution "promise[s] . . . that there is a realm of personal liberty which the government may not enter." *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 847. The result is a right of "personal privacy[.]" *Roe*, 410 U.S. at 152. The rights included within that zone are deemed "fundamental" and include "activities relating to marriage", "procreation", "contraception", "family relationships" and "child rearing and education." Id. at 152-53. They therefore involve "the most intimate and personal choices" a person can make in his or her lifetime. They include "choices central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 851.

"The first step in any substantive due process review is to determine the standard of review." *Sammon v. New Jersey Bd. of Med. Exam's*, 66 F.3d 639, 643-44 (3d Cir. 1995). Ms. Alexander argues that we must give these New Jersey statutes strict scrutiny because they impact upon a woman's "relationship" with an unborn fetus, and that relationship is within this protected zone of privacy included in the substantive component of the Due Process Clause.

Where fundamental rights or interests are involved, a state regulation limiting these fundamental rights can be justified only by a compelling state interest and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Roe*, 410 U.S. at 154 (citations omitted). Therefore, state limitations on a fundamental right such as the right of privacy are permissible only if they survive strict constitutional scrutiny. *Planned Parenthood*, 505 U.S. at 929 (Blackmun, J. dissenting)(citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)). However, where fundamental rights or interests are not implicated or infringed, state statutes are reviewed under the rational basis test. That is "the test traditionally applied in the area of social or economic legislation." *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting)(citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)). Under rational basis review, "a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute." *Sammon*, 66 F.3d at 645.

Ms. Alexander argues that her relationship with her unborn child during pregnancy is itself a fundamental interest, and that these statutes should receive strict scrutiny because they impact upon that relationship. However, we need not now determine whether a mother's relationship with her unborn child during pregnancy is a fundamental interest because the New Jersey statutes at issue here do not affect Ms. Alexander's *relationship* with her unborn child. A mother's relationship with her fetus is exactly the same whether or not she can bring a wrongful death or survivor action. it is not the relationship that is affected here, it is the ability to recover for the loss of that relationship.

Neither the Wrongful Death Act nor the Survival Action Act interfered with any decision Karen Alexander made or might have made about her stillborn child. It is impossible for us to imagine that any such decision would be the least bit influenced by whether or not a mother could bring a wrongful death or survival action to recover damages for the loss of a fetus. Ms. Alexander's assertion of a constitutionally impermissible interference with a fundamental interest is grounded in her argument that stillborn children and fetuses are being denied the protection of New

Jersey's tort law. The purpose of those laws, she argues, "is the deterrence of conduct which injures and kills others, and the promotion of caution to protect health and life." Appellants' Brief at 4. The denial of the tort law's protection is alleged to be the resulting infringement upon her fundamental interest in her relationship with her stillborn child. Appellants' Brief at 32.

However, that argument misstates the reality of New Jersey's tort law system. The wrongful death and survival statutes do preclude Ms. Alexander from instituting certain kinds of law suits on her own behalf, and on behalf of her unborn child. However, she is not being denied the protection of the state's tort law. She has a tort remedy and that remedy is a common law cause of action to recover for emotional distress and any injury to herself when medical malpractice causes the stillbirth of a baby.

> The gravity of such negligence, the foreseeability of parental suffering and the genuineness of injury and loss present a compelling case for recognition of the direct injury to the parents.
>
> . . . We thus conclude that the wrong committed by a doctor in negligently causing the pre-birth death of an infant constitutes a tort against the parents.

Giardina, 545 A.2d at 141-42. Thus, contrary to Ms. Alexander's assertions here, *Giardina* did not leave pregnant women defenseless against negligence that results in the death of a fetus. In fact, that court began its analysis noting "[b]y recognizing such a cause of action [in tort] we protect the interests affected by the tortious conduct resulting in the death of an infant before birth." *Id.* at 139. Those are the same interests that are implicated by wrongful death and survival actions. *Id.*[15]

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[15]We do not mean to suggest that the Fourteenth Amendment requires a state to provide a tort remedy for prenatal injuries. Indeed, that assertion is endemic in Ms. Alexander's attempt to fashion a Due Process right from New Jersey's purported failure to protect her fetus from the negligence of health care providers. Rather, we mention

Karen Alexander also relies heavily upon *Levy v. Louisiana*, 391 U.S. 68 (1968), its companion case, *Glona v. American Guar. & Liab. Ins. Co.* 391 U.S. 73 (1968), and *Weber v. Aetna Cas. and Sur. Co.*, 406 U.S. 164 (1972). However, those cases addressed the constitutionality of legislative enactments that discriminated against persons on the basis of having been born out of wedlock. They did not implicate substantive due process. Instead, they were equal protection challenges to statutory classifications. *Levy* invalidated the provisions of a state statute that excluded illegitimate children from the class of children entitled to recover for a parent's death under Louisiana's wrongful death statute and *Glona* involved the same statute's exclusion of a mother from recovering for the wrongful death of her illegitimate son. *Weber* invalidated the provisions of Louisiana's workman's compensation statute which excluded unacknowledged illegitimate children from recovering for the death of their wage-earner father.

In deciding *Levy*, the Supreme Court recognized that the illegitimate children's right to recover "involve[s] the intimate, familial relationship between a child and his own mother." *Levy*, 391 U.S. at 71. That recognition informed the decisions in *Glona* and *Weber*. However, the interest at issue in each of those cases was the classification of the child's legitimacy, "and the inability of both parent and child to reverse the burdens imposed by illegitimacy." Laurence H. Tribe, AMERICAN CONSTITUTION LAW §16-24, at 1554 (2D ED. 1988). The cases were not decided upon the basis of the family relationship as Ms. Alexander argues. In *Parham v. Hughes*, the Court explained the basis of *Levy* and its progeny.

> The basis rationale of these decisions is that it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it.

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the aspects of tort law that serve to protect her own bodily integrity, and the health of the fetus, to illustrate the weakness in her argument. See *Parham v. Hughes*, 441 U.S. 347 (1979) *infra*.

441 U.S. at 352.[16]

In *Parham*, the Court upheld a Georgia statute that restricted the class of persons who were entitled to bring wrongful death actions to recover for the death of an illegitimate child. Under that statute, only the mother, and those fathers who had legitimated the child in the manner prescribed by statute, could file suit. The plaintiff was the father of an illegitimate child whom he had not legitimated. The father had, however, signed the child's birth certificate and had contributed to the child's support. When the child and its mother were killed in an auto accident, the father brought a wrongful death action in state court. The defendant moved for summary judgment on the grounds that the applicable statute precluded the suit because plaintiff had not legitimated the child, but the trial court denied the motion on the grounds that the statute violated both the Equal Protection and Due Process Clauses. On appeal, the Georgia Supreme Court reversed, and the Supreme Court thereafter accepted the appeal from that decision to decide "whether [the] statutory scheme violates the Equal Protection or Due Process Clause of the Fourteenth Amendment by denying . . . the right to sue for the child's wrongful death." *Id.* at 349. The Court refused to apply the heightened scrutiny it had applied in *Weber*, and upheld the statute using the "rational means" test, and the concomitant presumption of validity. The Court reasoned that the classification established under the statute was a rational means of limiting tort claims, as well as false claims of paternity. The Court focused primarily upon the classification, and did not base its analysis upon whether the statute deprived plaintiff of a fundamental right noting - in passing - "[i]t can not seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right." *Id.* at 358. Ms. Alexander's Equal Protection and Due Process claims must fail for the same reason. The statutes do not

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[16]Ms. Alexander criticizes the district court for relying upon *Roe* while not even citing *Levy*. See Appellant's Br. at 40. However, it is easy to understand why the district court did not cite *Levy*, *Glona* or *Weber*. Those cases are simply not relevant to the issues raised here.

interfere with her relationship with her fetus as she claims, nor do they interfere with a fundamental right.

Parents do, of course, have a fundamental liberty interest in the care and custody of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); see also *Lehr v. Robertson*, 463 U.S. 248, 258 (1983)("[T]he relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."). Moreover, there is an intense emotional bond consisting of the great joy and hope that naturally develops between a mother and the child she is carrying in her womb. Indeed, it is the awareness of the reality and intensity of the mother-fetal bond which apparently led the New Jersey Supreme Court to create a parental right of recovery for the emotional distress suffered by the parents when medical malpractice causes a stillbirth. *Giardina*, 545 A.2d at 140.

Karen Alexander's actual complaint is with the tort remedy that New Jersey has provided. She would prefer to be able to institute a wrongful death and survival action, either in lieu of, or in addition to, the tort remedy first recognized in *Giardina v. Bennett*.[17] Since there are rather severe limitations on the emotional distress that one can recover for under *Giardina*, the concern is that the mother of a stillborn will not be able to show the degree of severity necessary to recover, in spite of the fact that negligence and causation are shown. However, the fact that a mother may not be able to prove the degree of emotional distress necessary to recover in a given case does not mean that mothers whose children are stillborn because of the tortious conduct of others are denied the protection of New Jersey's tort law.

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[17]To prove a claim for emotional distress caused by the tortiously-caused death of a fetus, "the mother must prove that she suffered emotional distress so severe that it resulted in physical manifestations or that it destroyed her basic emotional security." *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993). "the worry and stress . . . [attendant] upon the birth of every child will not suffice. Nor will the upset that every parent feels when something goes wrong in the delivery room." *Id.*

Since New Jersey has not infringed upon any relationship Ms. Alexander had with her stillborn infant, this substantive due process claim does not merit strict scrutiny review. Accordingly, we inquire only to see if it is a rational means of achieving a legitimate state interest. When subjecting a state statute to rational basis review, "a court . . . is not entitled to second guess the legislature on the factual assumptions or policy considerations underlying the state." *Sammon*, 66 F.3d at 645. The only inquiry permitted "is whether the legislature rationally might have believed that the predicted reaction would occur or that the desired end would be served." *Id.* It is up to the person challenging the statute to "convince the court that the legislative facts on which the classification [of the statute] is apparently based could not reasonably be conceived as true by the governmental decisionmaker." *Id.* at 645-46 (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). A statute "withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature rationally could conclude was served by the statute." *Id.* at 645.

One cannot seriously argue that New Jersey has no interest in defining who is entitled to recover for injuries and in setting limits on tort recovery for wrongful death. The requirement that the child on whose behalf a wrongful death and survival action is instituted have been born alive is rationally related to that interest. New Jersey has chosen to draw a bright line that eliminates the nearly impossible problems of proof inherent in such actions when injury to a fetus is at issue. Absent the limitation in these statutes it would be difficult, if not impossible, to prohibit a wrongful death or survival action no matter how early the fetus was in its development. This would mean that one could recover if it could be established that a zygote would have developed had not an alleged tortfeasor injured a developing fertilized egg seconds after the union of sperm and egg. Although a state could permit recovery for an injury to that which would later develop into a fetus, it is certainly not required to do so under the Due Process or Equal Protection Clauses. Limiting such actions in the manner that New Jersey has chosen is both reasonable and practical. Ms. Alexander argues that including stillborn children and fetuses within the coverage of wrongful death and survival actions would not harm New Jersey's legitimate interest in setting limits on tort

recovery. She may be correct, but that is not for us to determine. Her disagreement is with the legislative policy decision about where the line should be drawn and "those disputes are not legally relevant under substantive due process jurisprudence." *Id.* at 647.

2. THE EQUAL PROTECTION CLAIM.

The Equal Protection Clause of the Fourteenth Amendment "announces a fundamental principle: the State must govern impartially," *New York Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979), and "directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982)(quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Therefore, "[g]eneral rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply" with the Equal Protection Clause. *Beazer*, 440 U.S. at 587. Only when a state "adopts a rule that has a special impact on less than all persons subject to its jurisdiction" does a question arise as to whether the equal protection clause is violated. *Id.* at 587-88.

However, the clause does not require that things which are different in fact be treated in law as thought they are the same. *Plyler*, 457 U.S. at 216. "The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. *Id.* Accordingly, "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). Therefore, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Comm. v. Beach*, 508 U.S. 307, 313 (1993).[18]

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[18] *Federal Communications Comm. v. Beach* involved a challenge under the Due Process Clause of the Fifth Amendment of a provision of the Cable Communications Policy Act by operators of satellite master antenna and television facilities. Because the Fifth Amendment imposes

Mrs. Alexander argues that New Jersey's exclusion of the stillborn and fetuses from coverage under the wrongful death and survival acts creates two distinct classes.[19] While that may be true insofar as it states the similarity between the respective tragedies, it is not true insofar as it attempts to foster a principle of Equal Protection jurisprudence.

Ms. Alexander's Equal Protection claim parallels her Due Process claim in that she argues that New Jersey's classification affects fundamental rights, i.e., a mother's interest in her relationship with her child. However, as discussed earlier, Karen Alexander has not demonstrated how these statutes affect her relationship with her unborn child. Therefore, her own Equal Protection challenge is also entitled only to "rational basis" scrutiny. The rational basis standard is a "relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an

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on the federal government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment. *Schweiker v. Wilson*, 450 U.S. 221, 226 n.6 (1981), the Due Process Clause of the Fifth Amendment has an "implied equal protection guarantee." *Beach*, 508 U.S. at 312.

[19]Actually, Karen Alexander posits four classes. The first class is the largest class and is composed of all mothers who are pregnant. The second class is contained in the first class and is composed of pregnant mothers whose children sustain a prenatal injury. The third class is a subclass of the second class and consists of pregnant mothers whose children sustain a prenatal injury resulting in the death of a child after a live birth. The fourth class is also a subclass of the second class and is the Karen Alexander class composed of all pregnant mothers whose children sustain a prenatal injury and are stillborn. See Appellants' Brief, at 16-17. However, we do not think that delineating four classes is necessary for the purposes of this equal protection argument. It is the third and fourth classes which are significant here.

unavoidable one." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). Although New Jersey could have chosen to afford all mothers whose fetuses are injured a cause of action under the challenged statutes, the wisdom of not doing so is not before us. It is the legality of not doing so that we must decide, and we do not think the distinction that the state has drawn is illegal.

> [R]ational basis review in equal protection analysis is not a license for Courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that affect neither fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification . . . .
>
> A statute is presumed constitutional . . . and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be, and unscientific.

Heller v. Doe, 509 U.S. 312, 319-21 (1993). The "standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Id.* at 321. Only when the classification "rests on grounds wholly irrelevant to the achievement of the State's objectives" does a statute fail rational basis review. *Id.* at 323.

Apparently, there is no legislative history to assist us in determining if the challenged statues are rationally related to a legitimate state interest. However, the assumed legislative bases for the Wrongful Death Act were extensively discussed in *Giardina v. Bennett*. There, the New Jersey Supreme Court analyzed that statute and concluded that the legislature defined the wrongful death action with the intent of limiting it to the class of people considered persons by the common law. As noted earlier, the New Jersey legislature was doing nothing more than setting limits on tort recovery in those cases when a person is killed by the tortious conduct of another. Accordingly, we find no violation of the Equal Protection Clause.

D. THE CLAIM OF THE DRAZIN PLAINTIFFS.

As noted above, Ms. Alexander's attorney and his law firm (the Drazin plaintiffs) also challenge these statutes. They allege a constitutional violation of *their* rights because they are precluded form bringing wrongful death and survival actions on behalf of Karen Alexander and other potential clients whose children were stillborn because of the wrongful acts of third parties. We are aware no constitutional provision that creates a right in attorneys to bring lawsuits under the circumstances involved here. Moreover, the district court quite properly concluded that Ms. Alexander is the party best suited to challenge these statutes and held that the Drazin plaintiffs lack standing. See *Amato v. Wilentz*, 952 F.2d 752 (3d cir. 1991).

In *Wilentz*, we noted that an inquiry into standing also encompasses prudential considerations.

> Where a plaintiff asserting third party standing has suffered concrete, redressable injury (that is, the plaintiff has Article III standing), federal courts are to examine at least three

> additional factual elements before allowing the suit to proceed. First, the court must examine the relationship between the plaintiff and the third party whose rights are asserted; second, the court must consider the ability of the third party to advance its own rights - whether some obstacle impedes the rightholder's own suit; and third, the court must inquire into the impact on third party interest - whether the plaintiff and the third party have consistent interests.

95.2d at 749 (citations omitted). We added that a Court may consider other "factors [that] may also be relevant to the ultimate prudential consideration." Id. at 750. The nature of the claim asserted by the Drazin plaintiffs would fall woefully short of these considerations even if it comported with the more formal "case and controversy" components or Article III standing. Indeed, whatever loss the Drazin plaintiffs may assert here is reduced to such insignificance (if not absurdity) by Ms. Alexander's tragic loss that we can not help but wonder how the Drazin plaintiffs can seriously challenge the district court's ruling as to their lack of standing. Moreover, since we conclude that there is no constitutional violation here, the Drazin plaintiffs' marginal claim fails in any event.

IV. CONCLUSION

In concluding, we wish to stress that we do not intend minimize the immensity of Ms. Alexander's tragic loss. Any parent would appreciate that it is of monumental proportion. However, our task is to apply those principles that control and guide legal analysis and thereby determine if the district court erred in dismissing the suit that was brought under section 1983. Though we understand how a parent would conclude that the interests at stake here are fundamental, that is not the test we must apply. "fundamental interest" in constitutional adjudication are not equivalent to general interests of "particular human or societal significance." *Price v. Cohen*, 715 F.2d 87, 93 (3d Circ. 1983)(citing *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). Rather, fundamental interests are those which "have their source, explicitly or implicitly, in the Constitution." Id. (citing *Plyler*, 457 U.S. at 217 n.15 (1982).

For the reasons set forth above we hold that Ms. Alexander has failed to establish that New Jersey's limitation on wrongful death and survival actions is unconstitutional, and we therefore affirm the judgment of the district court.

WRONGFUL DEATH STATUTES
N.J.S.A. 2A:31-1 to 2A:31-6

N.J.S.A. 2A:31-1 When action lies

When the death of a person is caused by a wrongful act, neglect or default, such as wound, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

N.J.S.A. 2A:31-2 Persons entitled to sue or make claim

Every action commenced under this chapter shall be brought in the name of an administrator *ad prosequendum* of the decedent for whose death damages are sought, except where decedent dies testate and his will probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

N.J.S.A. 2A:31-3 Limitation of actions

Every action brought under this chapter shall be commenced within two years after the death of the decedent, and not thereafter.

N.J.S.A. 2A:31-4 Persons entitled to amount recovered

The amount recovered in proceedings under this chapter shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled were dependent on the decedent at his death, they shall take the same as though they were sole persons so entitled, in such proportions, as shall be determined by the court without a jury, and as will result in a fair and equitable apportionment of the amount recovered, among

them, taking into account in such determination, but limited necessarily thereby, the age of the dependents, their physical and mental condition, the necessity or desirability of providing them with educational facilities, their financial condition and the availability to them of other means of support, present and future, and any other relevant factors which will contribute to a fair and equitable apportionment of the amount recovered.

N.J.S.A. 2A:31-5 Assessment of damages by jury

In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased, to the persons entitled to any intestate personal property of the decedent.

N.J.S.A. 2A:31-6 To whom amount recovered paid; release or cancellation of judgment

When an action is commenced by an administrator *ad prosequendum* under this chapter, no payment in settlement thereof or in satisfaction of a judgment rendered therein shall be made to him, but such payment shall be made only to the duly appointed general administrator of the estate of the decedent, who has filed a bond or supplemental bond adequate to protect the persons entitled to receive the amount so paid.

No release or cancellation of a judgment, whether by warrant or otherwise, by an administrator *ad prosequendum* or by his attorney of record or attorney in fact shall release the person making payment from liability to the persons entitled to any intestate personal property of the decedent, shall operate as a valid cancellation of the judgment or be an authority to the clerk of any court to cancel the judgment of record.

SURVIVAL ACTION
N.J.S.A. 2A:15-3

N.J.S.A. 2A:15-3 Actions which survive; torts to decedent; funeral and burial expenses

Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living.

In those actions based upon the wrongful act, neglect, or default of another, where death resulted from injuries for which the deceased would have had a cause of action if he had lived, the executor or administrator may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased.

U.S. Constitution
FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NOT FOR PUBLICATION

FILED
May 15, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY At 8:30 ____M
WILLIAM T. WALSH
Clerk

KAREN F. ALEXANDER, et al,

Plaintiffs,

v.

CHRISTINE TODD WHITMAN, et al,

Defendants.

CIVIL ACTION NO: 94-5229 (MLP)

MEMORANDUM AND ORDER

ENTERED ON THE DOCKET ON 5-18-97 WILLIAM T. WALSH, CLERK

BY: /s/ LAK
(Deputy Clerk)

PARELL, District Judge

This matter is before the Court on motion by state defendants Whitman and Poritz to dismiss, on motions by the County Surrogate defendants to join in the state defendants' motion to dismiss, and on motions by plaintiffs for class certification and for summary judgment. A hearing on these motions was held before this Court on March 6, 1995. Subsequently, plaintiffs filed a motion for leave to file a supplemental brief which is also presently before the Court.[1] For

[1]Plaintiffs seek leave to file a supplemental brief based on the perceived need to clarity the issues concerning the relevance of "viability" to this case and the way in which certain Supreme Court cases should be reconciled by this Court. Defendants oppose this motion.

Initially, the Court notes that it afforded plaintiffs ample time and leeway to argue and clarify its points at the

the following reasons, the motion to dismiss is granted, the motions to join in the motion to dismiss are granted, the motion for class certification is dismissed, the motion for summary judgment is denied and the motion for leave to file a supplemental brief is denied.

BACKGROUND

On July 15, 1992, plaintiff Karen F. Alexander was approximately eight and one-half months pregnant when the fetus she was carrying was delivered "stillborn." It is alleged that plaintiff Alexander's unborn baby was fatally injured while still in the womb due to the negligence of doctors, nurses and other health care personnel at Jersey Shore Medical Center.

On July 13, 1994, plaintiff Alexander filed a lawsuit in the Superior Court of New Jersey, Monmouth County, seeking damages as the Administratrix Ad Prosequendum of the Estate of Kaylyn Alexander under the New Jersey Wrongful Death Act, N.J. Stat. Ann. 2A:31-1, and as the General Administratrix of the Estate of Kaylyn Alexander under the New Jersey survival action statute, N.J. Stat. Ann. 2A:15-2. Plaintiff Alexander requested that the Surrogate of Monmouth County in the State of New Jersey issue Letters of Administration Ad Prosequendum and general Letters of Administration for the Estate of Kaylyn Alexander. This request was denied by letter dated October 18, 1994 on the basis that the baby identified as Kaylyn Alexander was "stillborn." This state suit is currently pending.

On October 24, 1994, plaintiffs Karen F. Alexander, Dennis

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hearing on these motions. Further, the Court notes that no issues arose during the hearing which had not previously been briefed by the parties. Thus, the Court concludes that the issues before the Court have been sufficiently briefed and argued by the parties and there is no need to clarify the issues which plaintiffs seek to clarify by way of a supplemental brief. Accordingly, the motion for leave to file a supplemental brief shall be denied.

Drazin, Esq., and the law firm of Drazin and Warshaw, P.C.,[2] instituted this suit against Christine Todd Whitman, the Governor of the State of New Jersey, Deborah T. Portiz, the Attorney General for the State of New Jersey, and the Surrogate of each and every county in the State of New Jersey. Plaintiff correctly asserts in this federal suit that her state court claims will be dismissed since the language of the Wrongful Death Act and the survival action statute, as written by the New Jersey Legislature and as construed by the New Jersey Supreme Court, do not provide a cause of action for the death of a fetus and since the Superior Court of New Jersey is duty bound to follow the law as it currently exists in New Jersey. It is here, in this federal suit, that plaintiff alleges these statutes, as written and as construed, are unconstitutional on the basis that they violate plaintiff's rights of equal protection and due process as secured by the Fourteenth

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[2]Plaintiff Karen F. Alexander brings this action on behalf of herself as the Administratrix Ad Prosequendum and the General Administratrix of the Estate of Kaylyn Alexander and also seeks to assert the action on behalf of the proposed class of all other mothers similarly situated whose stillborn fetuses have been injured in utero due to the tortious acts of third parties.

Further, Dennis Drazin, an attorney licensed to practice in New Jersey, and the New Jersey law firm of Drazin and Warshaw, P.C., (the "Drazin plaintiffs") are named as plaintiffs in this action on the basis that their constitutional rights have been violated in that they are precluded from bringing wrongful death and survival actions of behalf of potential clients whose stillborn fetuses have been injured in utero due to the tortious acts of third parties. The Drazin plaintiffs assert this action on behalf of themselves and the proposed class of all other attorneys and law firms similarly situated. As will be discussed infra discussion part I, neither Dennis Drazin, Esq. nor the law firm of Drazin and Warshaw, P.C. have standing to bring this suit. As such, all further reference to plaintiff in this Memorandum is a reference to plaintiff Karen F. Alexander unless otherwise indicated.

Amendment to the United States Constitution.[3] Plaintiff seeks a constitutional declaration which would expand the available causes of action for damages in New Jersey against alleged tortfeasors in cases involving the in utero death of a fetus.[4]

DISCUSSION

Defendants[5] move to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). A court may dismiss a complaint pursuant to Rule 12)(b)(6) "only if, accepting all well pleaded facts as true, the plaintiff is not entitled to relief." *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986). Additionally, all reasonable inferences from plaintiff's allegations "must be accepted as true and viewed in the light most favorable to the non-moving party." Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). This Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "The issue is not

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[3]To the extent that plaintiff alleges a violation of the unborn child's Fourteenth Amendment rights, the Supreme Court has held that "the word 'person" as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. 113, 158 (1973).

[4]The New Jersey Supreme Court holds that the bereaved parents of a fetus which dies before birth have available a common law cause of action in tort for compensatory damages based on their emotional distress and mental anguish due to the negligent conduct of a third party who is alleged to have proximately caused the stillbirth of a baby. See Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988). However, the New Jersey Supreme Court has determined that the statutorily created causes of action for wrongful death and for survival do not provide a further remedy with respect to the death of a fetus. Id.

[5]The motion to dismiss was filed by defendants Whitman and Poritz. Each of the County Surrogate defendants has filed a motion to join in the motion to dismiss. The Court grants the motions to join the motion to dismiss.

whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

I. Standing

Defendants move to dismiss Counts Three and Four, which are counts brought by plaintiffs Dennis Drazin, an attorney licensed to practice in New Jersey, and the New Jersey law firm of Drazin and Warshaw, P.C. (the "Drazin plaintiffs"), for the reason that these plaintiffs lack standing to assert the claims contained in these counts. The Drazin plaintiffs allege that their constitutional rights have been violated in that they are precluded from bringing wrongful death and survival actions on behalf of potential clients whose stillborn fetuses have been injured in utero due to the tortious acts of third parties. The Drazin plaintiffs bring this action on behalf of themselves and the proposed class of all other attorneys and law firms similarly situated.

A plaintiff must have standing to sue on the claim brought in order to present a justiciable case or controversy to the Court. Valley Force Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-72 (1982). To have standing, a plaintiff must be entitled to have the court decide the case and must have personally suffered some actual or threatened injury as a result of a defendant's allegedly unlawful conduct. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979); see Gariano v. CSC Ins. Co., 845 F. Supp. 1074, 1077 (D.N.J. 1994). The standing inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. Warth v. Seldin, 422 U.S. 490, 498 (1975).

As stated by the Supreme Court in Warth v. Seldin:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has alleged such

> a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'

Id. at 498-99 (citations omitted).

The Supreme Court has repeatedly held that generally, in order to have standing, a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. See Warth v. Seldin, 442 U.S. at 499; Tileston v. Ullman, 381 U.S. 44, 46 (1943); United States v. Raines, 362 U.S. 17, 22 (1960); Barrows v. Jackson, 346 U.S. 249, 255-56 (1953); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979). Even though a party might suffer a direct substantial injury from the application of a statute, unless that party is within the class whose constitutional rights are allegedly infringed by the statute, that party does not have standing to challenge the constitutionality of the statute. Barrows v. Jackson, 346 U.S. at 256. The requirement that a plaintiff assert his own legal rights in a case and not those of third parties derives from "prudential" principles established by the judiciary "to limit access to the federal courts to those litigants best suited to assert a particular claim." Gladstone Realtors v. Village of Bellwood, 441 U.S. at 99; see Gariano v. CSC Ins. Co, 845 F. Supp. at 1077 n.5.

The Drazin plaintiffs rely on Singleton v. Wulff, 428 U.S. 106 (1976) as supportive of their contention that they have standing here. However, the facts presented to the Court in Singleton are materially distinct from the facts presented to this Court in the instant case.

In Singleton v. Wulff, the Supreme Court permitted two physicians to assert a constitutional challenge to a state statute

excluding abortions not "medically indicated" from the purposes for which medicaid benefits are available to needy persons. The physicians were the only plaintiffs in Singleton and the action was not asserted by any woman or women who had been denied medicaid funding for an abortion. In holding that the physicians had standing to assert the constitutional challenge, the Court specifically looked to the fact that there were obstacles hampering the ability of a woman to assert that she has a constitutional right to medicaid benefits for an abortion. In addressing this fact, the Court noted:

> If there is some genuine obstacle to such assertion, [] the third party's absence from court loses its tendency to suggest that his rights is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent.

Id. at 115-116.

Here, this action is premised on the assertion that the limitations of the New Jersey wrongful death and survival action statutes unconstitutionally impinge upon plaintiff Karen F. Alexander's right to recover damages against persons whose allegedly tortious actions caused the death of the fetus she was carrying. Clearly, it is the legal rights and interests of plaintiff Karen F. Alexander which are at issue in this suit. Unlike the Singleton case where the action was not brought by any woman or women who had been denied medicaid funding for an abortion, Karen F. Alexander is a plaintiff here and undeniably she is the litigant best suited to bring this suit,[6] not the Drazin plaintiffs,

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[6]Plaintiff Karen Alexander presents a justiciable claim here. Plaintiff has asserted causes of action under the statutes in state court and has attempted to obtain the necessary Letters of Administration Ad Prosequendum and general Letters of Administration. Under the existing state of the law, a cause of action under these statutes based on the wrongful death of a fetus is not recognized and plaintiff's causes of action asserted in the state court will not be recognized and will be dismissed. Thus, plaintiff's challenge to the constitutional validity of theses statutes

who stand to benefit only collaterally from a declaration by the Court here that the statutes are unconstitutional. Thus, since the Drazin plaintiffs' claim for relief here in necessarily based on the alleged violation of the constitutional rights of plaintiff Alexander and the proposed class of all other mothers similarly situated, it is clear to the Court that neither Dennis Drazin, Esq. nor the law firm of Drazin and Warshaw, P.C. have standing to bring this suit. Accordingly, insofar as defendants move to dismiss the compliant based on the Drazin plaintiffs' lack of standing, the motion shall be granted.

II. Constitutional Challenge

Here, the Court is presented with a constitutional challenge to the New Jersey Wrongful Death Act, N.J. Stat. Ann. 2A: 31-1, and the New Jersey survival action statute, N.J. Stat. Ann. 2A:15-

3. The New Jersey Wrongful Death Act provides:

> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

N.J. Stat. Ann. 2A:31-1.

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presents a substantial controversy between parties having adverse legal interest. Plaintiff has personally suffered some actual or threatened injury as a result of the allegedly unconstitutional denial of her purported legal right to bring a cause of action under the statutes. See Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945); Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 85086 (1960); Baker v. Carr, 369 U.S. 186 (1962).

The New Jersey survival action statute provides:

> Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living.
>
> In those actions based upon the wrongful act, neglect, or default of another, where death resulted from injuries for which the deceased would have had a cause of action if he had lived, the executor or administrator may recover all reasonable funeral and burial expenses in addition to damages accrued during the lifetime of the deceased.

N.J. Stat. Ann. 2A:15-3.

It is a well-settled principle of constitutional law that the determination of the meaning and constitutionality of state statutes is most appropriately the function of the highest state court. Plymouth Coal. Co. v. Pennsylvania, 232 U.S. 531, 546 (1914). The New Jersey Supreme Court, Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988), was presented with the issue of whether "[parents] have a statutory cause of action for the recovery under the Wrongful Death Act attributable to their baby's stillbirth." Id. at 420. The court considered and analyzed at length the language, legislative history and treatment of the New Jersey Wrongful Death Act, N.J. Stat. Ann. 2A:31-1, and interpreted the use of the word "person," as set forth in the language of the Act, as set forth in the language of the Act, as not having been intended by the Legislature to encompass or include unborn or stillborn fetuses. Id. at 420-28. The Giardina court held that the Wrongful Death Act does not provide the parents of a stillborn fetus with a cause of action under this Act. Id. at 429.[7] In its discussion of the issue, the Giardina court recognized that permits

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[7]See also Egbert v. Wenzl, 199 Neb. 573, 260 N.W. 2d 480, 482 (1977) (no intention by legislature to create an action for the wrongful death of a viable fetus when it enacted the wrongful death statute).

i this kind of a case are not without a remedy since the common law provides a cause of action for "compensatory damages based on their emotional distress and mental anguish proximately caused by the negligent conduct of their doctor that results in the stillbirth of their baby." Id. at 420. The hold of the Giardina court is the current state of the law as applied in New Jersey and has not been contradicted or overruled by any legislative act.

Although not expressly addressed by the New Jersey Supreme Court in Giardina, it is clear by the implications of the holding in Giardina and by the language of the survival action statute itself that the New Jersey Legislature did not intend to provide the parents of an unborn or stillborn fetus with a statutory cause of action for survival.[8]

Here, plaintiff alleges that the failure to include unborn or stillborn fetuses within the definition of "persons" as provided by the language of the Wrongful Death Act and the failure to include unborn or stillborn fetuses within the language of the survival action statute, constitutes a violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment. Plaintiff argues that the State of New Jersey has neither a rational basis nor a compelling interest[9] in excluding unborn or stillborn fetuses

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[8]Examination of the language of the survival action statute clearly indicates that the legislature meant to create this cause of action for "persons" who were born alive, e.g., "if [the deceased] had lived" and "damages accrued during the lifetime of the deceased."

[9]"The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972) (citing Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955)). However, plaintiff urges that because the statutes at issue impinge upon a fundamental interest, a heightened level of scrutiny is applied which requires the state to have a compelling interest to justify excluding parents of unborn

from the definition of "persons" as provided by the language of the Wrongful Death Act and from the language of the survival action statute.

The Supreme Court has held that legislation "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently as some points is a matter for legislative, rather than judicial, consideration." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980). "[T]he Fourteenth Amendment permits the

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or stillborn fetuses from having a right of action on these statutes.

However, contrary to plaintiff's assertion, the statutes at issue do not impinge upon a fundamental interest. Liberty interests which have been held to be fundamental include "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Planned Parenthood of Southeastern Pennsylvania v. Casey, __ U.S. __, S. Ct. 2791, 2807 (1992). As such, the Constitution protects a person's most basic decisions about family and parenthood from unwarranted governmental intrusion or interference. Id.

The statutes at issue create causes of action to remedy damage caused by tortious conduct which has resulted in death and do not impinge upon any fundamental interest in making basic decisions about family and parenthood or upon any personal decision relating to marriage, procreation, contraception, family relationships, child rearing, and education. Any impingement here would be on the right to maintain statutorily created causes of action based in tort and this right is not fundamental for purposes of determining the level of scrutiny applied to a statute which is constitutionally challenged.

Accordingly, these statutes are subject to review under the rational basis standard.

States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." McGowan v. Maryland, 366 U.S. 420, 425 (1961). "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Id. at 425-26; see Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 546 (1914); State v. Profaci, 56 N.J. 346, 349-50, 266 A.2d 579, 581 (1970). Moreover, a legislature is not required to articulate its reasons for enacting a statute and it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Accordingly, if a statute is susceptible to a judicial interpretation rendering it constitutionally valid, the canons of statutory construction require the courts to adopt such an interpretation. See South Utah Mines & Smelters v. Beaver County, 262 U.S. 325, 331 (1922); Driscoll v. Edison Light & Power Co., 372 U.S. 29 (1963).

In Justic v. Acchison, 19 Cal, 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), overruled on other grounds by Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985), the Supreme Court of California addressed the issue of whether an unborn fetus is a person for purposes of the state's wrongful death statute. The plaintiffs in Justus, like the plaintiffs herein, argued that the failure to provide a statutory cause of action for the wrongful death of a fetus constitutes a denial of the equal protection of the laws. Id, 565 P.2d at 133. The Justus court considered and rejected this argument and upheld the constitutionality of the statute. Id, 565 P.2d at 1233-34.[10] As correctly noted by the Supreme Court of California in Justus:

> [The Equal Protection Clause] is not intended to make it necessary that the legislature, when conferring new rights of action upon particular classes of citizens for injuries not

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[10] In Giardina, the New Jersey Supreme Court cited with approval the reasoning of the Supreme Court of California in Justus. Giardina, 111 N.J. at 422, 424.

> previously actionable, should by the same act declare that all persons who may suffer damages from injuries of that character shall also have such right of action. Many considerations of public policy affect the question of the propriety and extent of such laws, the weight and effect of which, and the method of meeting or avoiding them, are matters resting exclusively in the legislative discretion . . .. The decision of the legislature as to how far it will extend the new right is conclusive, unless it appears beyond rational doubt that an arbitrary discrimination between persons or classes similarly situated has been made without any reasonable cause therefor.

Justus, 565 P.2d 133-34 (citations omitted).

The rational basis standard requires only that a statute be rationally related to a legitimate government objective. Schweiker v. Wilson, 450 U.S. 221, 230 (1981). Here, in enacting the Wrongful Death Act and the survival action statute, the New Jersey Legislature created new rights of action for injuries or damages not previously actionable. The purpose behind wrongful death and survival statutes is to provide a decedent's survivors and dependents with a right to recover compensatory damages suffered as a result of the wrongful death of the decedent. That these statutory causes of action are limited to situations where the decedent was born alive is not arbitary, but bears a rational relationship to the legitimate legislative goal of placing reasonable limits on wrongful death and survival actions in the State of New Jersey. See Giardina, 111 N.J. at 424-27; Justus, 565 P.2d at 133-34. As such, the Legislature was not acting irrationally or arbitrarily by failing to extend these statutorily created causes of action for wrongful death and survival to the parents of fetuses never born alive. See Justus, 565 P.2d at 133-34.

Although the parents of a baby never born alive may claim a right to assert these statutory causes of action which is almost equally as strong as the claimed right of the parents of a baby born alive, the fact that these statutes require a "person" to have been born alive is a distinction which is a matter for legislative, rather than judicial, consideraion. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. at 179. Thus, there is no denial of due process

or equal protection based on the fact that these statutes do not provide a tort cause of action for the wrongful death of a fetus or unborn child. See Justus, 565 P.2d at 133-34.

Accordingly, defendants' motion to dismiss the complaint in its entirety for failure to state a claim shall be granted.[11]

IT IS therefore on this 12th day of May, 1995, ORDERED that the motion to dismiss by defendants Whitman and Poritz is hereby GRANTED;

IT IS FURTHER ORDERED that the motions by the County Surrogate defendants to join in the motion to dismiss by defendants Whitman and Poritz is hereby GRANTED;

IT IS FURTHER ORDERED that the motion by plaintiffs for class certification is hereby DISMISSED;

IT IS FURTHER ORDERED that the motion by plaintiffs for summary judgment is hereby DENIED;

IT IS FURTHER ORDERED that the motion by plaintiffs for leave to file a supplemental brief is hereby DENIED.

/s/ Mary Little Parell
MARY LITTLE PARELL
United States District Judge

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[11]Since the Court concludes that this action should be dismissed in its entirety, there is no need to consider plaintiffs' motion for class certification. Accordingly, the motion for class certification shall be dismissed.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street
P.O. Box 896
Red Bank, New Jersey 07701
(908) 741-2525
HJC/5217
Attorneys for Plaintiffs

KAREN F. ALEXANDER, Individually, on her own behalf; and KAREN F. ALEXANDER, on behalf of all other persons similarly situated; and DENNIS DRAZIN, ESQ., individually on his own behalf, and DENNIS DRAZIN, ESQ., on behalf of all attorneys similarly situated; DRAZIN AND WARSHAW, a professional corporation for the practice of law, organized under the laws of the State of New Jersey, individually and DRAZIN AND WARSHAW, P.C. on behalf of all law firms similarly situated	Civil Action No.
Plaintiff(s),	CLASS ACTION COMPLAINT
v.	
CHRISTINE TODD WHITMAN, individually, and CHRISTINE TODD WHITMAN in her capacity as governor of the State of New Jersey; DEBORAH T. PORITZ, individually, and DEBORAH T.PORITZ, in her capacity as the Attorney General of the State of New Jersey; JANICE S. MATHIS, as Surrogate of Atlantic County New Jersey; STEPHEN	

R. ROTHMAN, as Surrogate of Bergen County New Jersey; ELTON A. CONDA as Surrogate of Burlington County New Jersey; MARIA BARNABY GREENWALD as Surrogate of Camden County New Jersey; W. ROBERT HENTGES as Surrogate of Cape May County New Jersey; HARRY A. FREITAG, JR. as Surrogate of Cumberland County New Jersey; MARIA VIZCARRONDO-DeSOTO as Surrogate of Essex County New Jersey; DONALD H. WAGNER as Surrogate of Gloucester County New Jersey; DONALD W. DeLEO as Surrogate of Hudson County New Jersey; SUSAN HOFFMAN GREENE as Surrogate of Hunterdon County New Jersey; CAROL OSWALD as Surrogate of Mercer County New Jersey; KEVIN J. HOAGLAND as Surrogate of Middlesex County New Jersey; MARIE S. MUHLER as Surrogate of Monmouth County New Jersey; EUGENE F. DOYLE as Surrogate of Morris County New Jersey; FRANKLIN V. FISCHER as Surrogate of Ocean County New Jersey; ROSALIE MASSERI as Surrogate of Passaic County New Jersey; GENEVA B. WOOD as Surrogate of Salem County New Jersey; VERNON A. NOBLE, as Surrogate of Somerset county New Jersey; NANCY FITZGIBBONS as Surrogate of Sussex County New Jersey; ANN P. CONTI as Surrogate of Union County New Jersey; ALBERT J. RUH as Surrogate of Warren County New Jersey.

Defendant(s).

The plaintiffs, Karen F. Alexander, Dennis Drazin, Esq. and Drazin & Warshaw, a professional corporation, individually on their own behalf, and on behalf of all other persons and entities similarly situated, all of whom reside in the State of New Jersey, by way of Complaint against the main defendants, say:

1. This is a Civil Action brought pursuant to 42 U.S.C. §1983 to address the deprivation of the color of state law of rights, privileges and immunities guaranteed by the Constitution of the United States. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated seeking a declaratory judgment that the wrongful death statute and the survival action statutes of the State of New Jersey, on its face, and as applied, which extend various causes of action to some mothers and children, but deprive other mothers and children of the same causes of action, are unconstitutional as being in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and further seek mandatory injunctions against the defendants to extend the causes of action to all mothers and children properly before the New Jersey courts and for money damages and attorneys fees and other relief which the court deems just.

JURISDICTION AND VENUE

2. This action is brought pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988. Jurisdiction is conferred upon the Court by 28 U.S.C. §1343. Declaratory and related injunctive relief are authorized by 28 U.S.C. §§2201-2202. Venue is properly laid in the District of New Jersey pursuant to 28 U.S.C. §1391.

PARTIES

3. Karen F. Alexander, is a citizen of the State of New Jersey and of the United States. In 1992 she was pregnant with a baby girl who died as a result of the professional negligence of a number of tortfeasors. Karen Alexander's daughter died before actual birth.

4. The Plaintiff Drazin and Warshaw, Esqs. is a law firm organized as a Professional Corporation under the laws of the

State of New Jersey with offices in Red Bank, New Jersey and its members are licensed to practice law in that State. Drazin and Warshaw provide services to victims of all forms of tortious conduct, including the representation of mothers who have lost children through the negligence of others, including the representation of mothers whose children have died prior to birth as a result of the tortious conduct of third parties. In their representation of persons who have lost children as a result of the negligence of people who are legally liable, Drazin and Warshaw are compensated for their services by the payment of attorneys fees based upon the fact of monetary recover and its amount.

5. Plaintiff Dennis Drazin, Esq., is a citizen of the State of New Jersey and of the United States. He is an attorney at law of the State of New Jersey and is the president of the professional corporation of Drazin and Warshaw, organized to practice law. In his law practice he routinely represents victims of the tortious conduct of third parties, including mothers whose children have died as a result of the negligence of persons who are legally liable under New Jersey Law for their conduct. The services are compensated in such cases by payment of attorneys fees based upon the amount of damages that is recovered in the particular action in which he provides his services.

6. The defendant Christine Todd Whitman is sued herein personally in her individual capacity as well as in her capacity as Governor of the State of New Jersey. She currently holds the office of Governor of the State of New Jersey and has held that office since January of 1994. As Governor she is the individual who is ultimately responsible for the enforcement of the laws of the State, their implementation, and the even handed application of the laws.

7. Deborah T. Poritz is sued herein in her individual capacity as well as her capacity as Attorney General of the State of New Jersey. She currently holds the office of Attorney General and is responsible for the review and enforcement of the laws of the State of New Jersey.

8. Janice S. Mathis is currently the Surrogate of Atlantic County of the State of New Jersey and as such is the

individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Atlantic County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

9. Steven R. Rothman, is currently the Surrogate of Bergen County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Bergen County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

10. Elton A. Conda, is currently the Surrogate of Burlington County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Burlington County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

11. Maria Barnaby Greenwald, is currently the Surrogate of Camden County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Camden County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

12. W. Robert Hentges, is currently the Surrogate of Cape May County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Cape May County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

13. Harry A. Freitag, Jr., is currently the Surrogate of Cumberland County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of

general Letters of Administration of the estates of all individuals who reside within Cumberland County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

14. Maria Vizcarrondo-DeSoto, is currently the Surrogate of Essex County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Essex County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

15. Donald H. Wagner, is currently the Surrogate of Gloucester County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Gloucester County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

16. Donald W. DeLeo, is currently the Surrogate of Hudson County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Hudson County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

17. Susan Hoffman Greene, is currently the Surrogate of Hunterdon County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Hunterdon County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

18. Carol Oswald, is currently the Surrogate of Mercer County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who

reside within Mercer County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

19. Kevin J. Hoagland, is currently the Surrogate of Middlesex County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Middlesex County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

20. Marie S. Muhler, is currently the Surrogate of Monmouth County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Monmouth County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

21. Eugene F. Doyle. is currently the Surrogate of Morris County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Morris County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

22. Franklin V. Fischer, is currently the Surrogate of Ocean County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Ocean County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

23. Rosalie Masseri, is currently the Surrogate of Passaic County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Passaic County as well as the issuance of all Letters

of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

24. Geneva B. Wood, is currently the Surrogate of Salem County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Salem County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

25. Vernon A. Noble, is currently the Surrogate of Somerset County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Somerset County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

26. Nancy Fitzgibbons, is currently the Surrogate of Sussex County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Sussex County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

27. Ann P. Conti, is currently the Surrogate of Union County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Union County as well as the issuance of all Letters of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

28. Albert J. Ruh, is currently the Surrogate of Warren County of the State of New Jersey and as such is the individual who supervises and is responsible for the issuance of general Letters of Administration of the estates of all individuals who reside within Warren County as well as the issuance of all Letters

of Administration Ad Prosequendum of the estate of all individuals who have died residing within the County.

COUNT ONE

29. Karen F. Alexander is a mother who carried her baby girl from conception for more than eight and one-half months. On or about July 15, 1992, as the direct result of the negligence of her primary treating doctor, and other physicians, nurses and health care providers, plaintiff Karen Alexander's daughter was caused injury, pain, suffering and death.

30. The plaintiff Karen F. Alexander's daughter was born on July 15, 1992. Her baby daughter was not alive at the moment of birth, as a direct consequence of the negligence of the treating doctor and others.

31. On or about July 13, 1994, the plaintiff Karen F. Alexander instituted a law suit against the negligent parties who caused the death of her daughter. In the law suit Karen F. Alexander brought a wrongful death claim as the Administratrix Ad Prosequendum of the Estate of her daughter, and a survival action for the suffering of the daughter as the General Administratrix of the Estate of her baby girl. That action is currently pending in the Law Division of the Superior Court of New Jersey, venued in Monmouth County, and bears Docket No. L-3896-94.

32. By letter dated October 18, 1994 defendant Marie Muhler, Surrogate of Monmouth County, denied plaintiff Karen Alexander's request for the issuance of Letters of Administration Ad Prosequendum on the grounds that the baby was "still born".

33. Under N.J.S.A. 2A:31-1 to 6, New Jersey has created a cause of action, known as a "wrongful death" action, extended to survivors of individuals who have died as a result of the tortious conduct of third parties. Under the statute as construed by the New Jersey Supreme Court, the compensation that is awarded to persons to whom a wrongful death action is given is based on the pecuniary value of lost services and other activity of value based upon the relationship between the plaintiff and the decedent. Under New Jersey law a mother is extended a

wrongful death cause of action for the death of her child as a result of the tortious conduct of third parties. The right to receive and the amount of the monetary damages is based upon the existence and loss of the relationship between the mother and her child. Karen Alexander is the mother of a child who died as the result of the tortious conduct of third parties. Included among the wrongful death causes of action, that New Jersey extends to mothers who have lost children as a result of the tortious conduct of third parties, is a cause of action extended to mothers when the trauma inflicted upon her child which ultimately causes the child's death, occurs during pregnancy. The trauma (or medical malpractice) under New Jersey law may occur at any age of gestation from conception to birth, and the mother would possess the cause of action. However, under the wrongful death statute, as construed by the New Jersey Supreme Court (most recently in *Giardina v. Bennett, 111 N.J. 412 (1988)*), the statute excludes a class of mothers, including Karen Alexander, from enjoying the benefits of the wrongful death cause of action where the child dies before actual birth, although it extends the cause of action to those mothers whose child was traumatized prior to birth (even in early stages of pregnancy) but merely survives birth for any length of time.

34. The class of mothers on whose behalf this action is brought, of which Karen F. Alexander is a representative, are all pregnant women, where their children are of all ages from conception to birth and where the children have died before actual birth due to tortious conduct of third parties.

35. Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, Karen F. Alexander enjoys a protectable interest in her relationship with her daughter at all ages of her daughter's life from conception until natural death and possesses a protectable interest under the same clause, in her child's life. Until the death of her child, plaintiff Alexander and her daughter had an existing relationship protected by the due process clause, and enjoyment of it was a fundamental constitutional right under the United States Constitution.

36. The New Jersey wrongful death statute as written and construed deprives Karen F. Alexander of the equal protection

of the laws and is violative of her due process rights, and is thus unconstitutional under the Fourteenth Amendment of the United States Constitution Equal Protection and Due Process Clauses. The State of New Jersey and the named defendants have neither a rational basis nor a compelling interest in depriving a class of mothers who carry children during pregnancy and whose children die prior to actual birth as a result of the tortious conduct of third parties from sharing in the benefits of the wrongful death statute, which is extended to all other mothers, and as such constitutes a violation of equal protection and due process liberty interests and property interests of Karen Alexander. In addition, Karen Alexander has a protectable interest in her child's life, which interest is material to her equal protection of the laws and is violated by the New Jersey statutory scheme.

37. The Law Division of the Superior Court of New Jersey is duty bound to follow the statute as written and as construed by the New Jersey Supreme Court. Consequently, Karen F. Alexander's wrongful death cause of action is not recognized by the Law Division, because she falls within a class of mothers who is excluded under the statute. She, and all those similarly situated, are entitled to share in the proceeds of the cause of action and otherwise has standing to act as the Administratrix Ad Prosequendum of the Estate of her daughter. In order for her to prosecute the action, Karen F. Alexander or someone in her place, must establish that she is entitled to act as the Administratrix Ad Prosequendum of the Estate of her daughter and has the right to prosecute her claim. To do so, she or her representative must obtain letters ad prosequendum from the Surrogate of Monmouth County or the other twenty surrogates in the state. As a matter of course and custom in furtherance of the statutory scheme under the wrongful death statutes and in violation of the constitutional rights of Mrs. Alexander and all mothers similarly situated, the Surrogates of Monmouth County and the other twenty Counties of the State of New Jersey, refuse to issue Letters of Administration Ad Prosequendum of the estate of a child who dies prior to actual birth. The defendant Governor Christine Todd Whitman, as chief executive of the State of New Jersey is responsible for the just and even handed enforcement, administration and implementation of all laws in a constitutional fashion and has taken action to promote the unconstitutional

deprivation of the plaintiff's constitutional rights and has failed to take action to correct the unconstitutional deprivation of the plaintiff's rights. The defendant Deborah T. Poritz, as Attorney General, is responsible for the review and enforcement of the laws of the State of New Jersey and has failed to correct the unconstitutional deprivations of the plaintiffs' rights and has promoted the unconstitutional deprivation of the plaintiffs' rights.

38. Under the facts, the plaintiff Karen F. Alexander has the standing to seek the relief sought in this complaint for declaratory judgment and injunctive relief against the defendants. There is an actual controversy between the parties as set forth herein. The plaintiff and the members of her class have no clear and adequate remedy at law. If the wrongful death statute is not declared unconstitutional and a mandatory injunction issued compelling the defendants to extend the cause of action to this class of mothers in the same manner in which is extended to other mothers, it will cause irreparable injury to the plaintiff and the members of her class.

WHEREFORE, the plaintiff Karen F. Alexander, individually, on her own behalf, and Karen F. Alexander on behalf of all other mothers similarly situated who carry children at all ages of gestation from conception to birth who are injured as a result of the tortious conduct of third parties and whose injuries result in death prior to their birth, pray that this court grant the following relief against the named defendants:

1. Declare that the plaintiff, Karen Alexander and all those similarly situated enjoyed an existing relationship between mother and child protected by the Fourteenth Amendment and the New Jersey Wrongful Death Statute (N.J.S.A. 2A:31-1 to 6), on its face (as construed by the New Jersey Supreme Court) and as applied is unconstitutional in that it violates the rights of the plaintiff Karen Alexander and the members of her class guaranteed under the due process clause of the United States Constitution, which extends them protection of their liberty interests, property interests and interests in the life their children.

2. Declare that the plaintiff, Karen Alexander and all those similarly situated enjoyed an existing relationship between

the mother and child protected by the Fourteenth Amendment and the New Jersey Wrongful Death Statute (N.J.S.A. 2A:31-1 to 6), on its face (as construed by the New Jersey Supreme Court) and as applied is unconstitutional in that it violates the rights of the plaintiff Karen Alexander and the members of her class guaranteed under the equal protection clause of the Fourteenth Amendment of the United States Constitution;

3. Enter an Order providing for a mandatory injunction directing that defendants Mathis, Rothman, Conda, Barnaby, Greenwald, Hentges, Freitag, Vizcarrondo-DeSoto, Wagner, DeLeo, Greene, Oswald, Hoagland, Muhler, Doyle, Fischer, Masseri, Wood, Noble, Fitzgibbons, Conti and Ruh issue Letters of Administration Ad Prosequendum in wrongful death actions brought by mothers whose children are alleged to have died as a result of tortious conduct of third parties even though the child died before actual birth;

4. Enter an Order directing that the defendant Christine Todd Whitman as Governor of the State of New Jersey and Chief Executive Officer of the State and Deborah T. Poritz, as Attorney General, direct that the actions of all agents of the State be in full compliance with the recognition of the rights of the plaintiffs and extending to them the wrongful death cause of action in the same manner and to the same extent of all other persons to whom the cause of action is extended;

5. Grant to the plaintiff all expert fees, costs and attorneys fees in connection with the preparation and prosecution of this action, and grant all other relief which the court deems just.

SECOND COUNT

39. The plaintiff, Karen F. Alexander on her own behalf and on behalf of those similarly situated repeats and incorporates by reference the allegations of the prior thirty-eight paragraphs as if set forth at length herein.

40. As a matter of fact a child at every age of gestation from conception to birth is a complete, separate and irreplaceable human being and the daughter of Karen F. Alexander and all

mothers similarly situated are actual human beings who have relationships with their mothers carrying them. This relationship between these two separate, complete individual human beings is in actual existence throughout pregnancy. As a matter of fact, a child can experience pain beginning at eight weeks after conception up to the time of actual birth. As a matter of fact, Karen F. Alexander's baby daughter and all children similarly situated from ages eight weeks after conception to birth experience pain and suffer during trauma or as a result of injury or the damage to bodily systems necessary for the continuance of the life of the child.

41. In the law suit commenced on or about July 13, 1994, the plaintiff Karen F. Alexander seeks damages from third parties on account of their tortious conduct which resulted in the injury and pain and suffering of her daughter, and as such she has filed a "survival action". The laws of the State of New Jersey, under N.J.S.A. 2A:15-3, extends to the estates of individuals who have died as a result of the tortious conduct of third parties, the ability to recover money damages for the pain, suffering and injuries sustained by an individual while alive as a result of the tortious conduct. Under the relevant statute and case law, the mere fact that the injured human being has died as a result of the tortious conduct does not extinguish the cause of action. However, under the statute and the case law construing it, children who have expired prior to actual birth and their intestate survivors are excluded from the class of individuals who is given the cause of action for the child's injuries, pain and suffering. Under New Jersey law, children who sustain injuries, pain and suffering, during all ages during pregnancy and survive birth are extended a survival action even though they may die shortly after birth and their estates can recover for the injuries, pain and suffering sustained by them as a result of trauma during pregnancy. The class of children who are excluded from the benefits of the cause of action created by state statutes and law is based only upon the arbitrary fact that a child has not survived birth.

42. By letter dated October 18, 1994 defendant Marie Muhler, Surrogate of Monmouth County, denied plaintiff Karen

Alexander's request for the issuance of Letters of General of Administration on the grounds that the baby was "stillborn".

43. The New Jersey survival action statute as written and construed, both on its face and as applied, is unconstitutional because it deprives the baby daughter of Karen F. Alexander and all children similarly situated of the equal protection of the laws and is violative of the rights of the baby daughter of Karen F. Alexander and all children similarly situated, including protectable liberty interests, property interests, and protectable interest in their life under the Fourteenth Amendment of the United States Constitution equal protection and due process clauses. The State of New Jersey and the named defendants herein have neither a rational basis nor a compelling interest in depriving a class of children of any age from conception to actual birth who are injured and suffer and experience pain prior to birth as a result of the tortious conduct of third parties from sharing in the benefits of the survival action statute. The statutes, therefore, violate the equal protection rights of the baby daughter of Karen F. Alexander and children similarly situated as well as the due process, liberty interest, property interest and life interest of these children. In addition, Karen F. Alexander and all mothers similarly situated have a protectable interest in their child's life and a protectable interest in their child's health such that the denial by the State of New Jersey and the named defendants of the survival action is a violation of the equal protection and due process rights of the Fourteenth Amendment of Karen F. Alexander and all other mothers similarly situated. Karen F. Alexander and all members of her class have the legal standing to raise and litigate the rights of their children.

44. Under the laws of the State of New Jersey, the survival action of the daughter of Karen F. Alexander is not recognized by the courts because the child is excluded under the statute as construed, both on its face and as applied. Mrs. Alexander and all other similarly situated are entitled to share in the proceeds of the survival action and otherwise has standing to otherwise act as the general administratrix of the estate of her daughter. The defendant Governor, Christine Todd Whitman, as the Chief Executive of the State of New Jersey is responsible for the enforcement and implementation of all laws in a constitutional

fashion and has taken action to promote the unconstitutional depravation of the plaintiff's constitutional rights, and has failed to take action to correct the unconstitutional depravation of the plaintiff's rights. The defendant Deborah T. Poritz, as Attorney General, has failed to take corrective action to prevent the violation of plaintiff's rights and those of her daughter and has promoted such violation. The plaintiff Karen F. Alexander is unable under the law to obtain letters of General Administration of the Estate of her daughter from the surrogate of Monmouth County. Neither she nor any other mother similarly situated are able to obtain any letters of General Administration from any of the twenty-one surrogates within the State of New Jersey. As a matter of course and custom and in violation of the constitutional rights of Mrs. Alexander and her daughter and all children similarly situated and all mother similarly situated, and in furtherance of the statutory scheme of the survival action statutes, the Surrogates of Monmouth County and the other twenty counties of the State of New Jersey refuse to issue letters of General Administration of the estates of children who die prior to actual birth.

45. Under the facts, the plaintiff Karen F. Alexander and all those similarly situated have standing to seek the relief sought in this complaint for declaratory judgment and injunctive relief against the defendants.

46. There is an actual controversy between the parties as set forth herein. The plaintiff and members of her class do not have a clear and adequate remedy at law. If the survival action is not declared unconstitutional and the mandatory injunction issued compelling the defendants to extend the cause of action to this class of children and their mothers in their representative capacities in the same manner and to the same extent as to other mothers and children who are injured and die as a result of the tortious conduct of third parties, it will cause irreparable injury to the plaintiff and her child and the members of their classes.

WHEREFORE, the plaintiff Karen F. Alexander, individually and on her own behalf, and Karen F. Alexander on behalf of all other mothers similarly situated who carry children at all ages of gestation from conception to birth who were injured as a result of the tortious conduct of third parties and who die prior to actual

birth, pray that this court grant the following relief against the named defendants:

1. Declare that the plaintiff Karen F. Alexander's baby daughter and all those children similarly situated possess rights and interests under the equal protection clause of the Fourteenth Amendment of the United States Constitution and that the New Jersey survival action (N.J.S.A. 2A:15-3) on its face (as construed by the New Jersey courts) and as applied is unconstitutional in that it violates the rights of the daughter of Karen F. Alexander and all children similarly situated, which rights are guaranteed under the equal protection clause of the Fourteenth Amendment of the United States Constitution;

2. Declare that the plaintiff, Karen F. Alexander's daughter, and all those children similarly situated, possess rights and protectable interests under the Fourteenth Amendment Due Process clause and that the New Jersey survival statute (N.J.S.A. 2A:15-3) on its face (as construed by the New Jersey courts) and as applied is unconstitutional because it violates the rights of Karen F. Alexander's baby daughter and all member of her class guaranteed under the Due Process clause including their protected liberty interests, property interests and their protected interests in their own life under the Fourteenth Amendment of the United States Constitution;

3. Declare that the plaintiff, Karen F. Alexander and all those similarly situated enjoy equal protection and due process rights and interests under the Fourteenth Amendment and New Jersey's survival statute (N.J.S.A. 2A:15-3) on its face (as construed by the New Jersey courts) and as applied is unconstitutional because it violates the rights and interests of Karen F. Alexander and the members of her class under the Due Process clause since she and they have protected liberty interests in the health of their children at all ages, including pregnancy, property interests and their own interests in the life of their children at all ages including ages during pregnancy under the due process clause of the United States Constitution and that it also violates the equal protection rights and interests of Karen F. Alexander and all members of her class under the equal protection clause of the United States Constitution;

4. Entry of an Order providing for a mandatory injunction directing defendants Mathis, Rothman, Conda, Barnaby, Greenwald, Hentges, Freitag, Vizcarrondo-DeSoto, Wagner, DeLeo, Greene, Oswald, Hoagland, Muhler, Doyle, Fischer, Masseri, Wood, Noble, Fitzgibbons, Conti and Ruh to issue Letters of General Administration of the estate of children who die prior to actual birth in survival actions brought by mothers whose children are alleged to have died as a result of tortious conduct of third parties even though the child died before actual birth;

5. Entry of an Order directing that the defendant Christine Todd Whitman as Governor of the State of New Jersey and Chief Executive Officer of the State and Deborah T. Poritz, as Attorney General, take all necessary action to insure that the wrongful death and survival actions extended by the State of New Jersey be in full compliance with the recognition of the rights of plaintiffs and her child and the members of their classes and extend to them the wrongful death cause of action and the survival action in the same manner and to the same extent as all other persons to whom the causes of actions are extended;

6. Entry of an Order directing that the defendants pay the plaintiffs all costs, expert fees and attorneys fees in connection with the preparation and prosecution of this action, and any other relief the court deems just.

COUNT THREE

47. The plaintiffs Dennis Drazin, Esq., individually on his own behalf and on behalf of all attorneys similarly situated and Drazin and Warshaw, a professional corporation organized under the Laws of the State of New Jersey to practice law, individually, and on behalf of all members of its class, repeats and incorporates by reference the allegations of the first forty-three paragraphs of this Complaint as if set forth at length herein.

48. The plaintiffs Dennis Drazin, Esq., individually and Drazin and Warshaw, are attorneys who practice law in the State of New Jersey maintaining offices in the municipality of Red Bank. A substantial portion of their practice is devoted to the representation of victims of tortious conduct who have suffered

injury, disability and death. Included among those who have sought counsel from these plaintiffs are mothers whose children have died as a result of the tortious conduct of third parties, including mothers whose children died prior to actual birth. In their practice they have been compelled to decline cases where mothers have sought their services for compensation for the wrongful death and for compensation in survival actions of their children because of the discriminating and unconstitutional laws of the State of New Jersey. In these matters these plaintiffs are compensated by receiving fees conditioned upon their clients recovering damages and based upon the amount of the recovery, the fee arrangements being contingent fee agreements.

49. Dennis Drazin, and Drazin and Warshaw, and individual attorneys and law firms similarly situated represent and advise mothers who have lost their children as a result of their death because of tortious conduct of third parties where the death of the children occur prior to actual birth and shall continue to be practicing in this area of law in the future. The New Jersey wrongful death statute as written and construed by New Jersey court deprives the clients of Dennis Drazin, Drazin and Warshaw, all individual attorneys and law firms similarly situated of the equal protection of the laws and is violative of their client's equal protection and due process rights under the Fourteenth Amendment of the United States constitution. The State of New Jersey and the named defendants herein have neither a rational basis nor a compelling interest in depriving the clients of Dennis Drazin and Drazin and Warshaw, all individual attorneys and law firms similarly situated from sharing in the benefits of the wrongful death statute which is extended to all victims of tortious conduct except members of the class represented by Karen Alexander, and as such, constitutes a violation of the equal protection right of their clients, and a deprivation of their clients' due process liberty interests, property interests. In addition, the New Jersey statutory scheme violates the rights of these plaintiff's clients because they violate a protectable interest of their clients in their child's life, which is material to the equal protection of the laws and substantive due process.

50. As a result of the unconstitutional deprivation of the rights of their clients, Dennis Drazin, individually, and on behalf of

all attorneys similarly situated, and Drazin and Warshaw on their own behalf and on behalf of all law firms similarly situated, have sustained monetary damages in the form of lost fees in their representation of their clients. Dennis Drazin, individually and on behalf of all attorney similarly situated and Drazin and Warshaw and on behalf of all law firms similarly situated have standing to raise the constitutional rights of their clients where their equal protection and due process rights under the Fourteenth Amendment of the United States Constitution is violated by the New Jersey wrongful death statute. There is an actual controversy between the parties as set forth herein. The plaintiffs, and the members of their class, have no clear and adequate remedy at law. If the wrongful death statute is not declared unconstitutional, and a mandatory injunction issued compelling the defendants to extend the cause of action to the class of mothers represented in this action in the same manner in which it is extended to other mothers, it would cause irreparable injury to Dennis Drazin, individually, and the members of his class, and Drazin and Warshaw, individually and the members of its class.

WHEREFORE, the plaintiff, Dennis Drazin individually on his own behalf and Dennis Drazin on behalf of all attorneys similarly situated, and Drazin and Warshaw, P.C., on its own behalf and on behalf of all law firms similarly situated pray that this court grant the following relief against the name defendants:

1. Declare that all mothers have an existing relationship during pregnancy of mother and child which is protected by the Fourteenth Amendment of the United States Constitution and that the New Jersey wrongful death statute (N.J.S.A. 2A:31-1 to 6) on its face (as construed by the New Jersey Supreme Court) and as applied is unconstitutional because it violates the rights of their clients who are mothers who carry children and whose children die as a result of the tortious conduct of third parties and where the children die prior to actual birth under the due process clause and that the New Jersey wrongful death statute violates their rights under the Due Process clause of the United States Constitution, and deprives their clients of their protectable liberty interests, property interests and interests in the life of their clients' children;

2. Declare that all mothers whose children are injured and die as a result of tortious conduct of third parties where death occurs prior to birth and all those similarly situated enjoy an existing relationship between the mother and child protected under the Fourteenth Amendment of the United States Constitution and the New Jersey wrongful death statute (N.J.S.A. 2A:31-1 to 6) on its face (as construed by the New Jersey Supreme Court) and as applied is unconstitutional because it violates the rights of such mothers and all the members of their class as guaranteed under the equal protection clause of the Fourteenth Amendment of the United States Constitution;

3. Entry of an Order providing for a mandatory injunction directing defendants Mathis, Rothman, Conda, Barnaby, Greenwald, Hentges, Freitag, Vizcarrondo-DeSoto, Wagner, DeLeo, Greene, Oswald, Hoagland, Muhler, Doyle, Fischer, Masseri, Wood, Noble, Fitzgibbons, Conti and Ruh to issue Letters of Administration Ad Prosequendum in the wrongful death actions brought by mothers whose children are alleged to have died as a result of tortious conduct of third parties even though and where the child died prior to actual birth;

5. Entry an Order directing that the defendant Christine Todd Whitman as Governor of the State of New Jersey and Chief Executive Officer of the State and Deborah T. Poritz, as Attorney General, direct that the actions of all agents of the State be in full compliance with the recognition of the rights of mothers whose children have been injured and have died as a result of the tortious conduct of others, where the children have died prior to actual birth and the mother alleges that death is due to the tortious conduct of others and extending to them the wrongful death cause of action in the same manner and to the same extent as all other persons to whom the cause of action is extended;

6. Grant to the plaintiffs all costs, expert fees and attorneys fees in connection with the preparation and prosecution of this action, and grant all other relief the court deems just.

COUNT FOUR

51. The plaintiffs Dennis Drazin, Esq., individually on his own behalf and on behalf of all attorneys similarly situated and Drazin and Warshaw, a professional corporation organized under the Laws of the State of New Jersey to practice law, individually, and on behalf of all law firms similarly situated, repeat and incorporate by reference the allegations of the first forty-eight paragraphs of this Complaint as if set forth at length herein.

52. The plaintiffs Dennis Drazin, Esq., individually and Drazin and Warshaw, P.C. are attorneys who practice law in the State of New Jersey maintaining offices in the municipality of Red Bank. A substantial portion of their practice is devoted to the representation of victims of tortious conduct who have suffered injury, disability and death. Included among the clients who have sought counsel from these plaintiffs are mothers whose children have suffered injury, pain and suffering, and death as a result of the tortious conduct of third parties, including mothers whose children died prior to actual birth. In their practice they have been compelled to turn away cases where mothers have sought their services for compensation under the New Jersey survival statute and for compensation in survival action of their children. In these matters these plaintiffs are compensated by receiving fees conditioned by the plaintiffs recovering damages and based upon the amount of the recovery, the fee arrangements being contingent fee agreements.

53. Dennis Drazin, and Drazin and Warshaw, individual attorneys and law firms similarly situated represent and are consulted by mothers who have lost their children as a result of the injury, pain, suffering and death of their children as a result of tortious conduct of third parties where the death of the children occur prior to actual birth and they shall continue to practice in this area of law in the future. The New Jersey survival statute as written and construed by New Jersey court deprives the clients of Dennis Drazin, Drazin and Warshaw, and all individual attorneys and law firms similarly situated of the equal protection of the laws and violates the rights of their clients and the rights of their clients' children to equal protection and due process under the Fourteenth Amendment of the United States. The State of New Jersey and the named defendants herein have neither a rational basis nor a compelling interest in depriving the clients and client's children of

Dennis Drazin, Drazin and Warshaw, all other attorneys and all other law firms similarly situated (where they represent a class of mothers who carry children during pregnancy whose children die prior to actual birth as a result of tortious conduct of third parties) from sharing in the benefits of the survival statute which is extended to all other clients and their children's estates and, as such, constitutes a violation of the equal protection, due process liberty interests and property interests of the clients and the client's children of Dennis Drazin, Drazin and Warshaw, all individual attorneys and law firms similarly situated. In addition, the New Jersey statutory scheme violates the rights of these plaintiff's clients and their client's children because they violate a protectable interest in their client's interests in their children's life and their children's own interest in life in which is material to the equal protection of the laws and substantive due process.

54. As a result of the unconstitutional deprivation of the rights of their clients, and those of their client's children, Dennis Drazin, individually, and on behalf of all attorneys similarly situated, and Drazin and Warshaw on their own behalf and on behalf of all law firms similarly situated, have sustained monetary damages in the form of lost fees in their representation of their clients. Dennis Drazin, individually and on behalf of all attorney similarly situated and Drazin and Warshaw and on behalf of all law firms similarly situated have standing to raise the constitutional rights of their clients and the rights of their client's children, where their equal protection and due process rights under the Fourteenth Amendment of the United States Constitution is violated by the New Jersey survival statute. There is an actual controversy between the parties as set forth herein. The plaintiffs, and the members of their class, have no clear and adequate remedy at law. If the survival statute is not declared unconstitutional, and a mandatory injunction issued compelling the defendants to extend the cause of action to the class of mothers and their children represented in this action in the same manner in which is extended to other mothers, it would cause irreparable injury to Dennis Drazin, individually, and the members of his class, and Drazin and Warshaw, individually and the members of its class.

WHEREFORE, the plaintiff, Dennis Drazin individually on his own behalf and Dennis Drazin on behalf of all attorneys similarly

situated, and Drazin and Warshaw, P.C., on its own behalf and on behalf of all law firms similarly situated pray that this court grant the following relief against the name defendants:

1. Declare that all mothers and their children have an existing relationship during pregnancy of mother and child which is protected by the Fourteenth Amendment of the United States Constitution and that the New Jersey survival statute (N.J.S.A. 2A:15-3 to 6) on its face (as construed by the New Jersey Supreme Court) and as applied is unconstitutional in that it violates the rights of the mothers who carry children and whose children die as a result of the tortious conduct of third parties and the rights of the children themselves and where the children die prior to actual birth and that the New Jersey survival statute violates their and their children's rights under the Due Process clause of the United States Constitution, and deprives them of protection of their liberty interests, property interests and interests in the life of their children and their children's own liberty, property interests and interests in life;

2. Declare that all mothers whose children are injured and die as a result of tortious conduct of third parties whose death occurs prior to birth and their children enjoy an existing relationship between the mother and child protected under the Fourteenth Amendment of the United States Constitution and that the New Jersey survival statute (N.J.S.A. 2A:15-3) on its face (as construed by the New Jersey Supreme Court) and as applied is unconstitutional because it violates the rights of such mothers and their children and all the members of the class as guaranteed under the equal protection clause of the Fourteenth Amendment of the United States Constitution;

3. Entry of an Order providing for a mandatory injunction directing defendants Mathis, Rothman, Conda, Barnaby, Greenwald, Hentges, Freitag, Vizcarrondo-DeSoto, Wagner, DeLeo, Greene, Oswald, Hoagland, Muhler, Doyle, Fischer, Masseri, Wood, Noble, Fitzgibbons, Conti and Ruh to issue General Letters of Administration in the survival actions brought by mothers whose children are alleged to have died as a result of tortious conduct of third parties even though the child died prior to actual birth;

4. Entry of an Order directing that the defendant Christine Todd Whitman as Governor of the State of New Jersey and Chief Executive Officer of the State and Deborah T. Poritz, as Attorney General, direct that the actions of all agents of the State be in full compliance with the recognition of the rights of mothers whose children have been injured and have died as a result of the tortious conduct of others, where the children have died prior to actual birth and the rights of the children themselves, where the mother alleges injury, pain, suffering and death is due to the tortious conduct of others and extending to them the survival cause of action in the same manner and to the same extent as all other persons to whom the cause of action is extended;

5. Grant to the plaintiff all costs, expert fees and attorneys fees in connection with the preparation and prosecution of this action, and grant all other relief the court deems just.

COUNT FIVE

55. On behalf and Karen F. Alexander on behalf of all members of her class, Dennis Drazin, Esq., individually on his own behalf, Dennis Drazin, Esq. on behalf of all members of his class, and Drazin and Warshaw, P.C., individually and on behalf of all members of its class, repeat and incorporate by reference the allegations contained in the first fifty-two paragraphs of this complaint as if set forth at length herein.

56. The defendant, Christine Todd Whitman, individually, is the Governor of the State of New Jersey, and as such is responsible for the executive duties of the State of New Jersey. She is responsible for overseeing the fair and evenhanded administration and implementation of the rights of all individuals within New Jersey and ultimately responsible to insure against any violation of individual constitutional rights of the individuals in New Jersey. The defendant Deborah T. Poritz, individually, is the Attorney General of the State of New Jersey and as such is responsible for the review and correction of laws which violate the constitutional rights of individuals within New Jersey and for the supervision of the laws to insure that they are applied in a constitutional manner.

57. The concepts and principles of law of equal protection in due process which form the basis of this complaint are well known to Christine Todd Whitman and Deborah T. Poritz, or should have been well known to them, and their failure to correct the unconstitutional deprivation of the rights of the plaintiffs, their clients and members of their classes, constitutes a knowing deprivation of the constitution rights of the plaintiffs, their clients and the members of their classes.

WHEREFORE, the plaintiff, Karen F. Alexander, individually on her own behalf, and Karen F. Alexander on behalf of all members of her class, Dennis Drazin, Esq., individually on his own behalf, and Dennis Drazin, Esq., on behalf of all members of his class, and Drazin and Warshaw, P.C., individually and on behalf of all members of its class, pray this court to grant the judgment against the defendants Christine Todd Whitman and Deborah T. Poritz, for money damages together with interest, costs of suit, expert fees, and attorneys fees and any and all other relief the court deems just.

CASSIDY, FOSS & SAN FILIPPO
Attorneys for Plaintiff

BY: /s/ Harold J. Cassidy
HAROLD J. CASSIDY, ESQ.

Dated: October 20, 1994

POINT I: A CHILD IS A COMPLETE, SEPARATE, UNIQUE HUMAN BEING FROM THE MOMENT OF CONCEPTION TO BIRTH. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES PROVIDE NEW FACTUAL INFORMATION WHICH CONCLUSIVELY ESTABLISHES THIS FACT. THERE IS A CONSENSUS WITHIN SCIENCE AND MEDICINE CONCERNING THE BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION. AS A MATTER OF FACT A CHILD CAN EXPERIENCE PAIN BEGINNING AT EIGHT WEEKS AFTER CONCEPTION.

1. The Exploding Revolution of Molecular Biology Has Changed Man's Knowledge of Developmental Neurology.

Biologically, human beings are made up of molecular building blocks. Their development is controlled by the genetic material DNA and RNA which contain instructions carried out by the synthesis and functioning of proteins. In 1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations and biochemical studies on often heroic quantities of material. Since *Roe*, there have been many scientific, medical and technological advances and discoveries.[1] They show ignorance, errors of fact

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[1] Including: (1) Recombinant DNA Technology (allows the production of a large amount of specific pieces of DNA which assists in DNA probe research); (2) DNA Probe Technology (use of pieces of DNA that are radioactively labeled to find a piece of DNA or RNA that is related in sequence); (3) Southern Blot (combines the separation of molecules by electric charge and size with DNA probe technology); (4) Northern Blot (combines the separation of molecules by electric charge and size along with RNA probe technology for DNA); (5) DNA Mapping (process by which a map is made with guide posts of the DNA available in a particular sample (including chromosomes)); often accomplished by cutting the DNA molecule into pieces and then determining from where the pieces were derived); (6) DNA Finger Printing (a procedure whereby DNA probes to minisatellite regions of human DNA are used to provide a complex Southern Blot

and judgment concerning past scientific understanding of the child's existence as a unique human being, early development, ability to react to its environment and to feel pain prior to birth. These techniques permit scientists to observe human existence

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pattern; provides a test for relatedness between samples of DNA; used with PCR such comparisons can be done on as little as one cell from each source; (7) Polymerase Chain Reaction (PCR) (a test-tube method of amplifying DNA sequences to billions of times invented in late 1984 used to obtain information from a single cell); (8) Monoclonal Anti-Body Technology (antibody preparation which contains only single type of antibody molecule); (9) Hybridona Technique (used to produce human specific antibodies; detects human proteins or peptides); (10) Flow Cytometry (cells in suspension, often marked with fluorescent monoclonal antibodies are intercepted by a beam of light; produces signals which drive a cell sorting apparatus which sorts and counts cells based upon a desired property - used to completely remap the nervous system and for prenatal diagnosis with fetal cells isolated from maternal blood); (11) Improved Ultrasound Technology (permits observation of the fetus at early ages of gestation); (12) DNA Methylation (modification of DNA so that it is recognized as different); (13) Fetal Heart Monitoring (observes the operation of the human heart of the fetus at early stages of development); (14) Advances in electroence photography which improve detection of signals of brain activity; (15) DNA cloning (application of DNA techniques to prenatal diagnosis of certain single gene disorders introduced in 1976; DNA-based tests first applied for prenatal diagnosis of alpha-Thalassemia, 1978, sickle cell anemia, 1978, beta-thalassemia, 1980, hemophilia A, 1985, hemophilia B, 1984, phenylketonuria, 1985, Duchenne and Becker muscular dystrophy, 1985, cystic fibrosis, 1986, and Huntington's disease, 1986. Boehm, C.D., et als., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991); and (16) the use of restriction endonuclease enzymes. Martinis, J.; et als., "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology In Basic Life Sciences* 25(1983): 129-154, at p. 129-130. Cole, S.C.P., et als., "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109; Watson, J.D., et als., *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983; Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985; Arnheim, N., et als., "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J., et als., "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N., et als., "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174; Holding, C., et als., "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H., et als., "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

and development at a molecular level, applicable in determining genetic uniqueness, genetic diseases, sex and paternity through the analysis of human genes well in advance of gross anatomical observation.

2. The Life of Each Person Begins at Conception.

(a) Recent Developments in Science Support the Conclusion that the Life of a Human Being begins at Conception.

All of the genetic information and material necessary for the complete development of a unique human being is present at the moment of conception, when the male sperm penetrates inside the female's ovum. The child is a complete. separate, unique, identifiable human being for life from conception and the essence of the human being is complete.[2] The genetic information needed

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[2] Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584; Harlock E.B. Child Development 6th ed. McGraw-Hill, Inc. 1978 p. 53-54; Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975 p. 183; Clark J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985, p. 99. Volpe, E.P. Biology and Human Concerns, 3rd ed. Wm. C. Brown Co. 1983, p. 20. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989, p. 587-588. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989, p. 247, 288. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989, p. 409. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989, p. 25, 26, 28, 31. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988, pp. 409-410. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987; Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986, p. 86. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986, p. 57. Schuster, S.h.; and Asburn, S.S. *The*

to create a human being, as these authorities indicate, is D.N.A. From all of the authorities cited herein, the best analogy for an understanding of the workings of DNA in conception might be as follows: Physically, it is analogous to the ribbon of tape that is

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Process of Human Development: A Holistic Life-Span Approach 2nd ed. Boston: Little,
Brown, and Company, 1986, p. 50, 58-59. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985, p. 31. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985, p. 32. Clark, J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985, p. 99. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985, p. 9-10. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983, p. 52-53. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1983, p. 18-20. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982, p. 544, 584. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982), p. 564. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979, p. 52-53. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University Press, 1979, p. 8, 12. Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978, p. 51, 53-54. Strand, F.L. *Physiology: A Regulatory Systems Approach*. New York: Macmillan Publishing Company, Inc., 1978, p. 542. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child*. Homewood, IL: The Dorsey Press, 1977, p. 26. Pikunas, J. *Human Development: An Emergent Science*. McGraw-Hill, Inc., 1976, p. 111. Mader, S.S. *Inquiry into Life*. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976, p. 433. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975, p. 4, 42. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975, p. 37, 40. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975, p. 500. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975, p. 183. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974, p. 242. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: The C.V. Mosby Company, 1974, pp. 28-29. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974, p. 584.

used in a tape recorder. Inside the head of a sperm is a long thread one meter or so in length and so tightly coiled in 23 little pieces that its entire volume can be put on the point of a needle. It contains 23 chromosomes; the ovum has the same number. The interaction of the biological components can be analogized to a tape recorder playing music. When a mini cassette, on which the music of an artist is recorded, is played, one experiences the sounds of a symphony. The tape, however, contains no notes or music or musicians. Because of a special code written on the tape, information will be conveyed in such a way that the tape recorder will read it and make air move through a loudspeaker. What is heard by the listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life if played: inside the egg, which receives the tape band from the father, and which has its own tape band, there forms a sort of table or law of life. Within the egg there exists a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which in the analogy is the mini cassette of the symphony), but the information in the cell itself, which reads it. The cell is analogous to the magnetiscope of the tape recorder and possesses within it enormous information. If the genetic information is insufficient, conception fails and no human being exists.[3]

Methylation of cytosine establishes the conclusion that the child is a complete human being at conception. It's significance was unknown six years ago: DNA is even more sophisticated than previously suspected and its messages are written letter by letter, piece by piece. Everything to allow development of a particular human being exists at fertilization but is not read at the instant of conception. Every single stage of growth, although programmed at conception, manifests itself as the program is read. The female information acting in concert with the male information, provides the mechanism for the development of each part of the physical

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[3]Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p. 18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p. 32-37, 58-63; Oppenheimber, S.B., et al., *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. bookmakers, p. 20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcort, Brace, Jocvanovick, Inc. p. 584.

anatomy.[4] This information and sophisticated directed mechanisms is contained in the first cell. At each stage of development cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, etc. It has been determined for instance, that the male way of "spelling" is obligatory for muscles, so that, even in the female, information from which muscles are built needs to be underlined in the male way. This understanding contradicts previous notions about fetal development. The child is a complete, separate, unique and irreplaceable human being programmed for life from conception.[5]

Nine years ago Alec Jeffreys developed a technique which can determine the identity of a particular human being by using a region of a person's DNA to make a genetic "fingerprint," which uniquely identifies an individual and can be "read".[6] The Jeffreys technique has been applied to determine if two samples containing

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[4] Chaillet, J.R., et als. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719. Gilbert, S.F. *Developmental Biology*, Sunderland, Mass.: Sinaver Associates, Inc., 1985, at p. 61. It is absolutely required that in the first cell, there be both the DNA underlined by methylation in the male way and DNA methylation in the female way. This is the only cell in all of the life of a person in which those two methylation systems are present inside a cell unaltered.

[5] Chaillet, J.R., et als. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als., "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[6] Jeffreys, et al. *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Jour. of Hum. Gen., 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications,(1991).

genetic material (DNA) are from the same person.[7] The techniques of fetal cell intrusion, prenatal diagnosis of disease, villus sampling, in vitro fertilization, and sexing of preimplanted embryos also establish the existence of a unique human being early in gestation.[8] Modern molecular biology has found that by the third cell division after fertilization control of growth and development has been established by the child's DNA.[9]

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[7] Jeffreys, A.J., et als., "Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints." *Nature* 317 (1985):818-819, at pp. 818-819. Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356. The technique has been successful in establishing paternity of the developing child at 9 weeks gestation, with a certainty of 360 trillion to one. Kovacs, B.W., et als., "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474-478, at pp. 474-475. The procedure established the existence of a unique human being at the time of the tests.

[8] Price, J.O., et als. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731; Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E., et als., *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51; Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53; Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991); Handyside, A.H., et als. 1989 "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348; Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.

[9] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Mammalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92; H. Holtzer, J. Biekl and B. Holtzer, "Induction-dependent and lineage-dependent models for cell diversification are mutually exclusive," *Progress in Clinical Biological Research* 175 (1985), 3-11; Mavilio et al (1983), op. cit., 664-8; C. Hart et al., "Homeobox gene complex on mouse chromosome II: molecular cloning, expression in embryogenesis, and homology to a human homeo bos locus", *Cell* 43:1, (1985), 9-18. Recently, an "embryo" derived platelet activating factor was discovered which, when added to growth media, dramatically increased the developmental potential of the embryo. O'Neill, C., *A Consideration of the Factors Which Influence and Control the Viability and Developmental Potential of the Preimplantation Embryo*", Baillieres Clin Obstet Gyn Aecol 5(1991) 159-178. This chemical is produced by the new human

(b) There is a Consensus within the Scientific and Medical Communities Concerning the Biological Facts which Support the Conclusion that Life begins at Conception.

In 1981 the Sub-committee on Separation of Powers of the Judiciary Committee of the U.S. Senate (Human Life Bill, S. 158, 97th Cong., 1st Sess.) published a report which specifically found, as a matter of scientific fact, that the life of a human being begins at conception:

> The testimony of these witnesses and the voluminous submissions received by the subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: life of a human being begins at conception...today the facts are beyond dispute.Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings. *Report on Human Life Bill*, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

Some witnesses argued that the committee should not reach a conclusion about when the life of a person begins because "there was no consensus". The Sub-committee observed:

> It may at first seem difficult to reconcile how the existence of such a broad consensus with the testimony of some witnesses opposing S-158 ... who emphatically denied that it is possible to determine when a human life begins. If the facts are so clear, it is crucial to understand how, for example, one...could say that he knows of no scientific

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being, so that even before implantation, there exists an independent, unique human being able to produce substances that enhance his or her own chances of survival.

> evidence that shows when actual human life exists. ...Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in existence of the two distinct questions..., the scientific question and the value question. We must consider not only whether unborn children are human beings, but also whether to accord their lives intrinsic worth and value equal to those of other human beings. ...*It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn child has intrinsic worth and equal value with other human beings. ...Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question*. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are 'human beings', (meaning) living beings of the human species. Rpt., Human Life Bill, *supra*, at 10, 11. (Emphasis added.)

The report found that some witnesses erroneously claimed that whether the child is a person is a matter of definition, not a question of fact, and "person" can be defined any way one wishes. Only by disregarding the facts could one state that he "knows of no scientific evidence showing when actual human life exists," Report, *supra* at 11, 12.[10]

3. The Child Can Experience Pain as Early as Eight Weeks After Conception.

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[10] The plaintiffs and their substantial team of scientific experts are unable to find a single modern reference in the scientific literature which refutes the statement that human beings are genetically distinct and complete from their parents at the moment of conception. Plaintiffs have compiled and attached a partial list of quotations from scientific and medical journals which state that life of a human being begins at conception. See, Appendix A, at A-1 to A-8.

Recent discoveries now provide scientific evidence that children experience pain during gestation beginning at eight weeks after conception. With monoclonal antibody technology[11] and electrophysiology scientists now investigate nervous system function and development at the molecular level. We now know that the classical histological and functional criteria for defining cell types was previously oversimplified.[12] First described in 1985[13] was the detection of some 30 neuropeptides involved in the functioning human nervous system. Of particular relevance are substance P (chemical messenger of pain) and enkephalin (neurotransmitter involved in pain perception).[14] Their detection in samples of human tissue has been used to define and locate nervous system development and function, the complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human being. Since *Roe* a number of generally accepted assumptions about human neurological development and ability to feel pain have been refuted: [1] neonates were incapable of feeling pain;[15] [2] myelinated nerve fibers were necessary for pain perception (and did not form completely until after birth); [3] pain experience required pain detecting nerves connected to the thalamus and a mature brain cortex. These assumptions were based upon gross histological observations, with no knowledge of neuropeptides, or the methodologies and techniques recently developed. Only in the last decade has the concept that even normal

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[11] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

[12] Fischbach, G.D. "An Intro. to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, ed. M.D. Erich, et al. New York: Raven Press, 1987.

[13] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[14] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154. Neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue.

[15] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology*, 16(2) p. 549 et seq. (1989).

neonates cannot feel pain been refuted[16] and that a fully developed cortical brain region was necessary for pain perception determined inconsistent with the observations of care givers for premature infants.[17]

> Based upon new studies standard medical practice changed: Any decision to withhold anesthetic agents ought not to be based on the infant's age or *perceived degree of cortical maturity*; it should be based upon the same criteria used in older patients."[18] (Emphasis added).

With operative procedures being performed on premature babies as early as four months, it is a standard medical practice to anesthetize the child (at any age).[19]

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[16] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[17] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347. Biochemical studies supported the observations of care givers concerning pain experiences. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity. These are associated with experiences of pain. Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417. It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to preterm neonates Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431), and to the fetus Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B. Saunders Co. p. 176, at p. 176).

[18] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): at p. 1348.

[19] Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989. For discussion of current medical practice for pain relief for neonates see: Choonara, I, *Management of Pian in Newborn Infants*, in Seminars on Peranotology, 16(i):32-40 (1992); Malhortora, N., L. Han, *Privilege of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991).

Anesthesia is used during fetal surgery as early as 18 weeks gestation.[20]

Until recently pain perception was presumed to require myelinated nerve fibers[21]. This is not the case even in adults.[22] Unmyelinated nerve fibers transmit pain.[23] Most fibers of the nervous system are not myelinated until two years after birth.[24] The old view of the nervous system as hard wired, projecting from nociceptors to the thalamus and then to the cortex cannot explain pain experiences.[25] Science now questions that cortical

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[20] Harrison, M. et al., "The Fetus as a Patient," Ann Sur 213 (1991); 279-291, at p. 281. Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 27-30; Harrison, M.R., et als., "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49; Strickland, R.A., et als., "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 411-415. Harrison, M.R., et als., "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Longuker, M.T., et als., "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R., et als., "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411; Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[21] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at p. 153.

[22] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

[23] Anand, K.J.S.; and Hickey, P.R. Id; Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar, 1985, p. 109; Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, 320.

[24] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body*. Torstar Books, Inc. (1985).

[25] Wall, P.D. "The Biological Function and Dysfunction of Different Pain Mechanisms." In *Advances in Pain Research and Therapy*. Edited by F. Sicuteri, (10:19-28). New York: Raven Press, 1992, at p. 19.

involvement is necessary for pain detection.[26] Evidence supporting the conclusion that pain can be experienced before 23 weeks gestation includes the early detection of pain associated chemicals, the timing of nerve development, the observation of fetal behavior and the characterization of full term infants with anencephaly. The presence of substance P is a leading indicator of an organ system's ability to detect and transmit pain.[27] The involvement of neuropeptides in pain transmission was not known when science originally theorized a sensory cortex was needed for pain perception. It is a pain transmitter and a neuromodulator in the primary cortical areas of sensorial integration,[28] and was found in neuronal elements of the human cortex at eighteen weeks gestation (earliest time tested).[29] Substance "P" positive neurons and nerve fibers have been detected at eleven weeks and enkephalin positive neurons and nerve fibers at thirteen weeks gestation.[30] Substance "P" has been found as early as five weeks gestation and all stages thereafter.[31] The morphological substrate

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[26] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects. *Dev. Pharmocol Ther* 15(1990): 142-148, at p. 144. Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and Infant. *Lakartidningen* 88(1991) 1880-1885.

[27] "The importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed." Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

[28] Manolidis, L.; Baloyannis, S.; and Mandolidis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Development and Maturation." *Acta Otolaryngol* (stockh) 107(1989: 375-382, at p. 375.

[29] Manolidis, L., Id.

[30] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

[31] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S., et als., "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C., et als., "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.; Uddman, R., et als., "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A

(the necessary pieces) for pain detection in the spinal cord exists at very early developmental stages.[32] At twelve weeks gestation the thalamus, third ventricle, midbrain, brain stem, and cerebellar hemispheres are developed and their appearance, besides physical size, will go unchanged throughout the rest of fetal development.[33] At seven weeks cutaneous sensory receptors appear, preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord:[34]

> neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks.[35]

Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399; Luo, C.B., et als., "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

[32] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

[33] Filly, R.A. "Sonographic Anatomy of the Normal Fetus" In *The Unborn Patient* 2nd ed., ed. Harrison et al., 92-130, Phila.: W.B. Saunders Co., 1991, at 122.

[34] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322.

[35] Lagercrantz, H., et als. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen* 88(1991): 1880-1885.

Movement by the fetus away from outside stimulation,[36] and brain activity,[37] have been observed by the eighth week. Nature prepares the nervous system first so that all other systems can develop and function properly.[38] A basic sensory response loop is clearly present about eight weeks gestation.

Many behaviors characteristic of newborns are clearly present in children with anencephaly[39] (children born without a developed cortex).[40] Previously, these behaviors had erroneously been ascribed to cerebral hemispheric activity.[41] After birth these children breath spontaneously, have a grasp response,[42] and respond to noxious stimuli known to cause pain by avoidance, by withdrawal and by crying.[43] They breath, cough, hiccup, smile, grimace, yawn and suck. In a recent study of twelve anencephalic infants, all twelve responded to pain, had an exaggerated sustained response to touch, evidenced spontaneous movement, and breathed spontaneously.[44] Seven of the twelve responded to a stimulation at their mouth towards the stimulus and a sucking

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[36] Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351.

[37] Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

[38] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life.* St. Louis: The C.V. Mosby Company, 1974, at p. 35.

[39] The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[40] Shewmon, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

[41] The Medical Task Force on Anencephaly, supra.

[42] Ashwal, S., et als., "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[43] Stumpf, D.A., Med Task Force on Anencephaly."The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S., et als., "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[44] Ashwal, supra.

response.[45] Spontaneous movement in the child begins between six and seven and one-half weeks gestation.[46] Stimulation of the mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking 11 weeks.[47] The child 6 to 11 weeks gestation is neurologically developed at least equivalent to the twelve anencephalic children described above. They are capable of experiencing pain.

In 1994 a leading international medical journal published a government funded study which confirmed that children, beginning at the earliest age studied - between twenty-three and forty weeks gestation - experience pain. That published study warned that no procedure should be performed upon the child without analgesia.[48]

APPENDIX A

REPRESENTATIVE SCIENTIFIC AUTHORITIES WHICH CONCUR THAT OF A HUMAN BEING LIFE BEGINS AT CONCEPTION

1. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989.

   "A single lucky sperm may succeed in fertilizing it, starting the development of a new human being." p. 587

   "Fertilization occurs as the haploid nuclei of sperm and egg fuse, forming a diploid nucleus that contains all the genes of a new human being." p. 588

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[45] *Id.*

[46] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

[47] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

[48] Giannakoulopoulos, X., Sepulveda, W., Kourtis, P., Glover, V., and Fisk, N.M., "*Fetal Plasma Cortisol and B-Endorphin Response to Intrauterine Needling.*" Lancet 1994; 344:77-81.

2. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989.

"Since the parents differed genetically from each other, the zygote contains the genetic blueprint, so to speak, for a unique individual." p. 247

"Whatever the number of genes, there are obviously enough to direct the formation of the whole human animal from a fertilized egg ... ." p. 288

"An additional source of variation arises when a sperm and an egg unite. This recombination of a genetic materials adds to the pool of variation because no two eggs or sperm cells carry precisely the same genes. Therefore each recombination creates a unique individual." p. 288

3. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989.

"The life of an individual begins at conception, the fertilization of an ovum by a spermatozoon." p. 409

4. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989.

"Human development begins at fertilization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25

"The male and female pronuclei fuse and the maternal and paternal chromosomes intermingle. The new diploid cell is called a zygote. It is the primordium of a human being." pp. 25-26

"Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produces a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26

"Because half the chromosomes in the zygote come from the mother and the other half from the father, the zygote contains a new combination of chromosomes that differs from that of either of the parents. Consequently, fertilization forms the basis of biparental inheritance and ensures variation of the human species." p. 26

"The embryos chromosomal sex is determined at fertilization by the kind of sperm that fertilizes the ovum." p. 28

"Hence, it is the father rather than the mother whose gamete determines the sex of the embryo." p. 28

"Fertilization of the ovum by a sperm also initiates early human development by stimulating the zygote to undergo mitotic cell division or cleavage into two cells called blastomeres." p. 28

"Fertilization of the ovum usually occurs in the ampulla of the uterine tube. The process is complete when the haploid male and female pronuclei of the sperm and ovum, respectively, fuse to form a zygote. This diploid cell is the beginning of a new human being." p. 31

5. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988.

"The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410

"Genetically the zygote is complete. It represents a new single celled individual."

6. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987.

"Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertilization." p. __

7. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986.

"The development of a new human being begins when a male's sperm pierces the cell membrane of a female's ovum, or egg." p. 86

"The villi become the placenta, which will nourish the developing infant for the next eight and a half months." p. 86

8. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986.

"Human development begins at the moment of conception." p. 57

"Here, we will look at the process of fertilization that marks the beginning of the life cycle of a human being." p. 57

9. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986.

"Each individual begins life as a single cell that is formed by the union of two gametes - a sperm and an ovum (egg)." p. 50

"Characteristics are inherited according to specific laws, and the possibility of their occurrence in a new individual can be predicted." p. 58-59

10. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985.

"Development is a continuous process from conception (the fertilization of the ovum) to the death of the individual. For purposes of discussion, human development may be divided into two periods, prenatal development or embryology and postnatal development." p. 31

11. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985.

"Fertilization is the process whereby two sex cells (gametes) fuse together to create a new individual with genetic potentials derived from both parents." p. 32

12. Clark, J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985.

"Each human begins life as a combination of two cells, a female ovum and a much smaller male sperm. This tiny unit, no bigger than a period on this page, contains all the information needed to enable it to grow into the complex structure of the human body. The mother has only to provide nutrition and protection." p. 99

13. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985.

"... [T]here is absolutely no doubt at all that the story of the growth and development of a single being has its beginning at conception. This is the instant when a sperm from a human male enters and unites with an egg from a human female. The conceptual 'act of union' sets in motion a train of events of growth and development that only ends -

perhaps more than a century later - when life itself ends." p. 9

"Fertilization brings together two sets of chromosomal material, one half the genetic blue print from the father, one half the genetic blueprint from the mother. Sperm and egg composition is so programmed that each sperm contains half the total gene complement of the father, each egg half that of the mother. This ensures that when egg and sperm fuse, a full complement of chromosomes exist in the newly fertilized egg. From this a new individual grows, ..." pp. 9-10

14. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985.

"You are unique because the combination of your genes is unique, and nobody has exactly the same combination (even if you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environmental acts to shape the final product form the moment of conception onward."

15. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983.

"Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52

"Each species of plant and animal and every individual within a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird,

a flower different from a tree, and siblings different from each other." p. 52

"A zygote (a single fertilized egg cell) represents the onset of pregnancy and the genesis of a new life." p. 53

16. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1983.

"Although the egg is many times greater in volume than the sperm, the two have equal potentialities as far as inheritance is concerned. The blueprints for traits are carried in the nucleus of each gamete (the mature sex cell - egg or sperm). The genetic characteristics of the future child are established at the time the sperm nucleus unites with the egg nucleus." p. 18

"The fertilized egg is genetically different from both parents, and one could contend that biological life commences at the moment of conception." p. 19

"The traits of an individual are largely determined by the genetic composition of the individual. A specific genetic code is locked into each cell of an individual of the very moment of the union of the sperm and egg nuclei." p. 20

17. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982.

"The sets of genes carried by offspring produced by sexual reproduction differ from each other and from the sets carried by either parent." p. 544.

"Within 12 hours after sperm penetration the nuclei of the sperm and the egg fuse together, restoring the appropriate number of chromosomes for body cells. All of the genes that will determine the characteristics of the offspring are now present in a single nucleus, and the sex of the offspring is established." p. 584

18. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982).

"I suggest that as physicians we should view human existence as a continuum from the first cell division of the fertilized ovum until the death of the last cell in the [human] organism." p. 564

19. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980.

"The newly formed cell (which is known as a zygote) represents the beginning of life."

20. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979.

"The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52

"Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its own." pp. 52-53

"This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdivided into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53

21. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979.

"The fertilized egg is smaller than a pinhead, but inside it, in the chromosomes, are all the instructions and information needed for a new human being to develop." p. 8

"The egg cell nucleus also releases its chromosomes, and both sets line up in the middle of the cell. This is the moment of fertilization, when a new life comes into being." p. 12 (emphasis added)

22. Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978.

"Life begins at the moment of conception - the time when a female reproductive cell, the ovum (plural, ova), is fertilized by a male reproductive cell, the spermatozoon (plural, spermatozoa)." p. 51

"The first important condition occurring at the time of conception, when the ovum is fertilized by the spermatozoon, is the determination of the newly created individual's hereditary endowment. When the sperm unites with the ovum, everything the newly conceived individual will ever inherit from parents, grandparents, and other more remote ancestors is set." p 53

"After conception, nothing can be done to add to, or subtract from, the individual's hereditary endowment." p 54

23. Strand, F.L. *Physiology: A Regulatory Systems Approach*. New York: Macmillan Publishing Company, Inc., 1978.

"The instant of fusion of the sperm nucleus with that of the ovum initiates a fascinatingly complex series of reactions which ultimately are designed to bring to full development an individual of the same species as the parents, bearing all the characteristics of his progenitors but individually different in a multitude of small ways. At this important instant, the genetic sex has also been determined." p. 542

"The cell has formed a new, mature individual, and we have come full cycle." p. 542

24. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child.* Homewood, IL: The Dorsey Press, 1977.

"In the normal human being, each cell is diploid, which means that it contains pairs of chromosomes - 23 pairs, or a total of 46 chromosomes." ... "Each parent contributes one half of the chromosomes complement to the new organism." p. 26

"During meiosis two phenomena occur which effectively guarantee that the new individual will be genetically unique. One of the phenomena, crossing-over, occurs when the chromosomes pair up. The other, segregation, occurs when the chromosomes begin to separate." p. 26

25. Pikunas, J. *Human Development: An Emergent Science.* McGraw-Hill, Inc., 1976.

"The union of ovum and sperm nuclei defines the hereditary endowment." p. 111

"The development of the child begins at conception, about nine months before birth." p. 111

26. Mader, S.S. *Inquiry into Life.* Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976.

"Each gamete, you'll recall, contains the haploid number of chromosomes, and the fertilized egg, or zygote, contains the diploid number of chromosomes as the new individual now begins development." p. 433 (emphasis added)

27. Sussman, L.N. *Paternity Testing By Blood Grouping.* Springfield, IL: Charles C. Thomas Publisher, 1976.

"A complete cell called a zygote with its normal complement of twenty-three pairs of chromosomes is

formed and a new somatic cell series - thus a new individual - begins."

28. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975.

"Human life begins at Conception." p. 4

"Human life begins when one of many available sperm from a male succeeds in penetrating the wall of an ovum (egg) inside the female. The combination of material from the two parents, which determines what characteristics the new individual will inherit, begins a complicated sequence of development which will one day produce a mature human adult." p. 4

"Mendel assumed that a full set of genes comes from each parent as part of the fertilized egg (the zygote). This double set of genes is the genotype, the hereditary make up of the new individual." p. 42

29. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975.

"The life of a given individual begins when the sperm (male cell) penetrates the ovum (female cell)." p. 37

"Whatever biological potential is received from parents crosses this narrow hereditary bridge at the moment of conception." p. 40

30. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975.

"The sperm head then forms itself into a nucleus that approaches and eventually fuses with the nucleus of the ovum, producing, at that moment, a new single-celled individual or zygote. Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from

the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother." p. 500

31. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975.

"It is the resultant zygote that, by repeated mitotic cell divisions, will give rise to the adult of the next generation. This one of the most amazing facts of biology - that a single cell, by dividing and dividing and dividing again, can give rise to sometimes billions of cells of many different kinds and yet so precisely arranged that the resultant organism is not only a smoothly functioning individual but an individual of the same kind as the parent." p. 183

32. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974.

"The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximately 1/175 of an inch and its weight is about one 20-millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242

33. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: The C.V. Mosby Company, 1974.

"In that fraction of a second when the chromosomes form pairs, the sex of the new child will be determined, hereditary characteristics received from each parent will be set, and a new life will have begun." pp. 28-29

34. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974.

"The zygote therefore contains a new arrangement of genes on the chromosomes never before duplicated in any other individual. The offspring destined to develop from the fertilized ovum will have a genetic constitution different from that of either parent and from anyone else in the world." p. 584

A-103

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-0079-95T1

ESTELA B. MATAWARAN and
EDWARDO MATAWARAN,

Plaintiffs/Appellants,

v.

JAMES P. THOMPSON, M.D.,

Defendant/Respondent,

and

DR. KANE, a resident at St. Joseph
Hospital and Medical Center,
ST. JOSEPH HOSPITAL AND MEDICAL CENTER,
JANE DOE NURSE, JOHN DOE NURSE,
JANE DOE TECHNICIAN and JOHN DOE
TECHNICIAN,

Defendants.

Argued: May 8, 1996 - Decided: JUN 19 1996

Before Judges Shebell, Wallace and Newman

On appeal from the Superior Court of New Jersey,
Law Division, Passaic County.

Wilbur J. Van Houten argued the cause for appellant.

Benjamin H. Haftel argued the cause for respondent (Hurley & Vasios, attorneys: Mr. Haftel, on the brief).

PER CURIAM

This medical malpractice case arises as a result of the stillbirth of plaintiff's child. Relying on Carey v. Lovett, 132 N.J. 44 (1993), the trial judge dismissed plaintiffs' complaint at the end of their case for failure to prove severe emotional distress. On appeal, plaintiffs contend that they need not establish that they suffered severe emotional distress in order to maintain a prima facie case of negligent infliction of emotional distress. We disagree and affirm.

Plaintiffs Estela B. Matawaran[1] and Edwardo Matawaran presented the following evidence at trial. Plaintiff became pregnant in October 1988 and came under the care of defendant Dr. James P. Thompson. She was informed that her due date was July 12, 1989. Her pregnancy was uneventful until July 15, 1989. At that time plaintiff experienced as rush of fluid and went to the outpatient department of St. Joseph Hospital and Medical Center in Paterson. She was examined by a resident who informed her that "everything [was] okay." On July 22, plaintiff felt no fetal movement in her stomach. She called Dr. Thompson who instructed her to report to the hospital. While in the hospital, a fetal monitoring device was attached to plaintiff and a fetal monitoring strip record was produced. She was sent home after the test was completed. The following evening, July 23, plaintiff could feel no fetal movement and reported to the hospital where an ultrasound test was performed. Following the test plaintiff was informed that her baby was dead. The stillborn baby was delivered vaginally three days later on July 26.

---

[1]Reference to plaintiff in the singular refers to Estela Matawaran.

Plaintiff is a nurse and works twelve hour shifts. Since the loss of her baby she feels very lonely when she looks into the room that she and her husband had prepared for the baby. Plaintiff visits the baby's gravesite on birthdays, holidays, and at other times. She cries the entire time that she is there. Plaintiff no longer attends baby showers or children's parties. She and her husband stay together most of the time. Neither plaintiff nor her husband has visited a psychologist, psychiatrist, or marriage counselor, for counseling. Plaintiff did speak to a Priest about her problems on the first day that she returned to work after the loss of her baby, but has not spoken to the priest since then. Further, plaintiff has never contacted a support group for mothers who have lost a child.

Plaintiff presented evidence that Dr. Thompson's treatment deviated from accepted standards of medical care. At the end of plaintiff's case, the trial judge dismissed plaintiffs' complaint because of the failure to prove severe emotional distress.

On appeal, plaintiffs contend that they need not establish that they suffered severe emotional distress in order to recover. If we were writing on a clean slate, we might very well agree with plaintiffs' argument. However, our Supreme Court has spoken in this area and we must follow its direction.

In Giardina v. Bennett, 111 N.J. 412 (1988), plaintiff became pregnant and was given a due date of May 19, 1983. Id. at 414. When nearly two weeks overdue, on July 3, she underwent a stress test which revealed no problems. Ibid. Plaintiff was examined by her doctor several times over the next nine days but he refused to perform a Caesarean section. Ibid. Subsequently, on July 12, plaintiff was admitted to the hospital where the staff could not detect a fetal heartbeat and her doctor later confirmed that the baby was dead. Ibid. Plaintiff was given a drug to induce labor and the baby was stillborn the next day. Ibid.

Plaintiff brought a wrongful death action but did not file a direct claim. Ibid. The trial court dismissed the action and we affirmed. Id. at 415. On appeal, the Supreme Court concluded that while plaintiff could not recover under the Wrongful Death

Act, our common law recognized "a valid cause of action for the emotional injuries suffered by parents in this kind of case." Id. at 420. The Court found that "the experience of pregnancy and child birth itself constitutes the immediacy and presence of the claimant in the fact of inflicted personal injury or death of a loved one that was stressed in Portee [v. Jaffee, 84 N.J. 88 (1980),]" to justify a claim by the parents for "compensatory damages based on their emotional distress and mental anguish proximately caused by the negligent conduct of their doctor that results in the stillbirth of their baby." Id. 419-20.

The Court's holding in Giardina was later refined in Carey v. Lovett, 132 N.J. 44 (1993). In Carey, plaintiff had a normal pregnancy until October 9, 1983, when while she was in her sixth month, she felt ill and called her doctor. Id. at 50. She was admitted to the hospital on October 11, her diagnosis indicating "'uncontrolled diabetes, six months pregnant.'" Id. at 51. The hospital called plaintiff's doctor, and informed him of the diagnosis and that no fetal heart tones were detected. Ibid. A short while later plaintiff went into labor. Ibid. At some point the hospital staff informed plaintiff and her husband that the baby was dead. Id. at 52. Plaintiff refused to accept this conclusion because she could still feel movement. Ibid. A nurse later asked plaintiff's husband to tell her wife to listen to the nurses and he did so but plaintiff continued to believe that her baby was alive. Ibid. Plaintiff's doctor did not come to the hospital and she delivered her baby at 9:06 p.m., eight hours after being admitted to the hospital. Id. at 53. The baby, thought to be dead, was alive. Ibid. After a nurse removed the baby from the delivery room, she noticed that the baby gasped for air. Ibid. The baby was rushed to neonatal nursing and plaintiff's doctor finally arrived and informed her that her baby was still alive but was "profoundly damaged and in a vegetative state." Ibid. The baby's doctors gave her no chance for improvement and after plaintiff and her husband consulted with other doctors, they decided to disconnect the baby from life-support machines. Ibid. The baby died that same day. Ibid.

Plaintiff and her husband individually, and as administrators, sued her doctor and others. Id. at 55. The jury returned a verdict in favor of plaintiffs, awarding $1,000,000 to plaintiff, $500,000 to her husband, $550,000 to the baby's estate for pain and

suffering, and $450,000 for her wrongful death. Id. at 40. We reversed. Id. at 63. On appeal, the Supreme Court affirmed in part, reversed in part, and remanded for a new trial on all issues. Id. at 70.

The Court initially reviewed the law regarding recovery for emotional distress which generally requires a showing of a shocking event that caused death or injury that was witnessed by a close family member, that results in severe emotional distress. Id. at 55-58. The Court then noted that its "concern [was] not only with the genuiness of emotional distress claims and speculative damages but also with the effects of the expansion of liability on the medical profession and society." Id. at 58. In summarizing the elements needed for a claim of emotional distress arising out of an injury or death to a fetus, the Supreme Court held that:

> the mother must prove that she suffered emotional distress so severe that it destroyed her basic emotional security. The father's emotional distress must be equally severe. The worry and stress that attend the birth of every child will not suffice. Nor will the upset that every parent feels when something goes wrong in the delivery room. In addition, the father must contemporaneously observe the malpractice and its effects on the victim. He must also be shocked by the results.
>
> [Id. at 62.]

Justice Handler in his concurring opinion noted that he was troubled by the Court's reasoning which he believed would treat the mother like a bystander and require "genuine and severe emotional injury as an element of the mother's cause of action." Id. at 72.

It is clear that Carey requires proof from both the mother and the father that their emotional harm is severe in order to recover for emotional distress. See Carey, supra, 132 N.J. at 62; see also Dunphy v. Gregor, 136 N.J. 99, 108 (1994). Thus, the

degree of the harm suffered by each parent is crucial to the parents' claim for emotional distress.

Applying the principles of Carey to the case at hand, plaintiffs were required to prove "emotional distress so severe that it resulted in physical manifestations or that it destroyed [their] basic emotional security[,]" id. at 62, in order to prove a prima facie case. The record is clear that neither plaintiff nor her husband presented evidence of severe emotional distress in accordance with Carey. Consequently, we are constrained to affirm the dismissal of their case because of their failure to establish severe emotional distress.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ R. Emile Cox

R. Emile Cox, Clerk

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-0079-95T1

ESTELA B. MATAWARAN and
EDWARDO MATAWARAN,

Plaintiffs/Appellants,

v.

JAMES P. THOMPSON, M.D.,

Defendant/Respondent,

and

DR. KANE, a resident at St. Joseph Hospital and Medical Center, ST. JOSEPH HOSPITAL AND MEDICAL CENTER, JANE DOE NURSE, JOHN DOE NURSE, JANE DOE TECHNICIAN and JOHN DOE TECHNICIAN,

Defendants.

SHEBELL, P.J.A.D., concurring.

I am constrained to concur with the majority because of our Supreme Court's holdings as carefully analyzed by the majority. I must, however, express my disagreement with the unjust result which occurs upon application of those principles to this case. To me, and I would hope to the reasonable person, the harm suffered by the mother is so direct and certain that it, in and of itself, manifests the genuiness of the claim. There is no room for speculation with regard to the distress that a mother would suffer under these circumstances. Indeed, beyond the harm to the fetus, plaintiff was directly traumatized by having to carry the fetus knowing that it was without life. A rule which, on these facts, requires emotional distress so severe that it results in physical manifestations or that it destroys the basic emotional security of the mother, runs contrary to the principles of justice that our tort law has long sought to preserve.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ R. Emile Cox

R. Emile Cox, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street
P.O. Box 896
Red Bank, New Jersey 07701
(908) 741-2525
HJC/5217
Attorneys for Plaintiff

KAREN F. ALEXANDER, et al.,	HONORABLE MARY LITTLE PARELL
	Civil Action No. 94-5229
	PLAINTIFFS' NOTICE OF CROSS MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE COUNTS OF THE COMPLAINT SEEKING DECLARATORY AND INJUNCITIVE RELIEF AGAINST ALL DEFENDANTS
Plaintiff(s),	
v.	
CHRISTINE TODD WHITMAN, et al.	
Defendants	

To: Clerk of the Court
U.S. Courthouse
402 E. State Street
P.O. Box 515
Trenton, New Jersey 08608-0515

Patricia Schiripo
Deputy Attorney General
State of New Jersey

124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07102
Attorney for Defendants Whitman & Poritz

Notice to all other attorneys on service list attached

PLEASE TAKE NOTICE that on _____, 1995 the undersigned attorneys for the class action plaintiffs Karen F. Alexander, Dennis Drazin and Drazin and Warshaw shall move before the Honorable Mary Little Parell, U.S.D.J. in the United States Court House, Trenton, New Jersey, for an Order granting the plaintiffs summary judgment with respect to the first four counts of the complaint seeking declaratory and injunctive relief against all defendants.

PLEASE TAKE NOTICE that the plaintiffs shall rely upon the affidavits of Karen Alexander, Dennis Drazin, and Harold Cassidy, Esq., together with the brief filed with the Court in support of the motion for summary judgment as well as the brief that was filed with the Court in opposition to the defendants' motion to dismiss the complaint.

A proposed form of an order is submitted herewith.

Respectfully submitted,

CASSIDY, FOSS & SAN FILIPPO

/s/ Harold J. Cassidy
HAROLD J. CASSIDY
Attorneys for Plaintiffs

Dated: January 13, 1995

CERTIFICATION

I hereby certify that an original and two copies of the cover letter relating to this motion have been filed with the clerk of the United States District Court and that copies of the within notice of motion, affidavits, and brief in support of the motion for summary judgment have been served upon counsel for all defendants by

ordinary mail at the addresses which appear on the service list which is attached hereto. Copies have been sent via Federal Express to counsel for defendants Whitman and Poritz.

Respectfully submitted,
CASSIDY, FOSS & SAN FILIPPO

/s/ Harold J. Cassidy
HAROLD J. CASSIDY
Attorneys for Plaintiffs

Dated: January 13, 1995

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR DEFENDANTS-
APPELLEES Christine Todd Whitman
and Peter Verniero

Patricia A. Schiripo,
Deputy Attorney
General
Division of Law

ENTERED
on
The Docket
on 7-10-1997
WILLIAM T. WALSH, CLERK

ORIGINAL FILED
June 10, 1997
WILLIAM T. WALSH, CLERK

By C. C. Litty
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

KAREN F. ALEXANDER, et al.	)	
	)	Civil Action
	)	94-5229(MLP)
Plaintiffs-Appellants,	)	
	)	ORDER ON THE
	)	MANDATE OF THE THIRD
CHRISTINE TODD WHITMAN, et al.	)	CIRCUIT COURT OF
	)	APPEALS DISMISSING THE
	)	COMPLAINT AND FOR
Defendants-Appellees	)	TAXED COSTS

This matter having been heard by the Third Circuit Court of Appeals on the record from the United States District Court for the District of New Jersey and having been argued by counsel on May 9, 1996 and on consideration thereof and in accordance with the opinion of the Third Circuit Court of Appeals.

IT IS on this 9th day of July, 1997

ORDERED and adjudged that the judgment of the United States District Court for the District of New Jersey entered on May 18, 1995 is hereby affirmed;

IT IS FURTHER ORDERED that costs be taxed against appellants in favor of Appellees Christine Todd Whitman and Peter Verniero in the amount of $125.80.

/s/ Mary Little Parell
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5414

KAREN ALEXANDER; DENNIS DRAZIN, ESQ.;
DRAZIN AND WARSHAW,

v.

CHRISTINE TODD WHITMAN; PETER VERNIERO;[1]
JANICE S. MATHIS; STEPHEN R. ROTHMAN; ELTON A.
CONDA; W. ROBERT HENTGES; HARRY A. FREITAG, JR.;
MARIA VIZCARRONDO-DE SOTO; DONALD H. WAGNER;
DONALD W. DE LEO; SUSAN HOFFMAN GREENE;
CAROL OSWALD; KEVIN J. HOAGLAND; MARIE S.
MUHLER; *JOHN PECORARO; FRANKLIN V. FISHER;
ROSALIE MASSERI; GENEVA B. WOOD; VERNON A.
NOBLE; NANCY FITZGIBBONS; ANN P. CONTI; ALBERT J.
RUH; MARIA BARNABY GREENWALD

Karen Alexander, individually and on behalf of all persons similarly situated; Dennis Drazin, Esq., individually and on behalf of all attorneys similarly situated; and Drazin & Warshaw, a professional corporation, individually and on behalf of all firms similarly situated,

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[1]Deborah T. Poritz was the Attorney General for the State of New Jersey when this suit was instituted. Since that time, Deborah T. Poritz resigned as Attorney General and was appointed Chief Justice of the Supreme Court of New Jersey. Subsequently, peter Verniero was appointed the Attorney General. Pursuant to Fed. R. App. proc. 43(c), Peter Verniero is automatically substituted as a party plaintiff for Deborah T. Poritz.

Appellant

*Caption amended per the Clerk's order of 10/25/95

Present: Greenberg, Alito, and McKee, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on May 9, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 18, 1995, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ P. Douglas Sisk
Clerk

Dated: May 23, 1997
Costs Taxed in Favor of Appellees Christine Todd Whitman & Peter Verniero as follows:

Total for Brief.....$125.00
Total.....$125.00

Certified a true copy and issued in lieu
of a formal mandate on 6/16/96

Teste: P. Douglas Sisk

Clerk, United States Court
of Appeals for the Third Circuit

12G Statement in the Matter of
Karen F. Alexander, et al. v. Christine Todd Whitman, et al.

Civil Class Action
United States District Court for the District of New Jersey

Docket Number 94-5229 (MNLP)

The plaintiff believes that none of the facts that are asserted in the Briefs on the Motion for Summary Judgment are contested. These facts include that Karen F. Alexander was pregnant with a baby daughter whom she named Kaylyn Elissa Alexander, on July 15, 1992. At that time, Kaylyn was between ages 37 and 39 weeks gestation. Karen F. Alexander was under the supervision and care of an obstetrician during the pregnancy and on July 15, 1992, that physician, together with other doctors, nurses and health care personnel at Jersey Shore Medical Center provided medical care to both Karen and Kaylyn Alexander through labor and delivery. As the result of the negligence of the doctors, nurses and others, Kaylyn Elissa Alexander sustained injury, pain and death on July 15, 1992. The death of Kaylyn ensued while she was still in her mother's womb and before her actual birth, and was therefore declared "stillborn".

Kaylyn Alexander was alive fourteen minutes prior to the birth, and an autopsy was performed three days later resulting in a death certificate attributing the cause of death to cardiovascular collapse. The hospital records described Kaylyn as having had "intrapartum demise".

On July 13, 1994, Karen F. Alexander filed a lawsuit in the Superior Court of New Jersey, Law Division seeking damages under New Jersey's Wrongful Death and Survival Action Statutes. She sought recovery for the loss of her relationship with her daughter, Kaylyn, as the result of the negligence of the defendants named in that suit. She also sought recovery for the injury and pain to Kaylyn while she was alive beginning with the acts of negligence of the defendants. Mrs. Alexander and her attorneys received oral and written reports of medical experts who expressed the opinions that various defendants in the action had committed

medical malpractice. That action is currently pending in the Superior Court of New Jersey.

In October 1994, the surrogate of Monmouth County, Marie Muhler, through her agents, denied the request of Karen Alexander, made through her attorneys, for the issuance of letters of Administration ad prosequendum, and General Letters of Administration of the Estate of Kaylyn Alexander.

As a matter of scientific fact, Kaylyn Alexander was a living human being prior to her death as a result of tortious conduct and was a separate, complete and unique human being between conception and birth. She was alive until the acts of negligence of the defendants terminated her life and she'd be a living human being today in the absence of those tortious acts. Throughout pregnancy, Karen F. Alexander had an existing relationship with her daughter, Kaylyn, from the moment of conception until the time of her death on July 15, 1992. The relationship was an intimate one between two separate, distinct, complete and unique human beings and was a relationship of mother and child throughout that period.

The plaintiff does not believe that there is a genuine issue concerning any of these material facts. With respect to the fact that the child is a human being and that the mother has an existing relationship with her child throughout the pregnancy, New Jersey, through its prior pronouncements in case law, has admitted the accuracy and the truth of them. Plaintiff does not believe, for reasons set forth in the briefs submitted to the Court, that there can be any dispute on any of these facts of a genuine or credible nature and that Summary Judgment is appropriate and required with respect to the first four counts of the Complaint.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street
P.O. Box 896
Red Bank, New Jersey 07701
(908) 741-2525
HJC/5217
Attorneys for Plaintiff

KAREN F. ALEXANDER, et al.,	HONORABLE MARY LITTLE PARELL
	Civil Action No. 94-5229
Plaintiff(s)	AFFIDAVIT OF HAROLD J. CASSIDY IN SUPPORT OF PLAINTIFFS' NOTICE OF CROSS MOTION FOR SUMMARY JUDGMENT ON THE FIRST FOUR COUNTS OF THE COMPLAINT
v.	
CHRISTINE TODD WHITMAN	
Defendant(s).	

Harold J. Cassidy, being of full age, deposes and says:

1. I am an attorney at law in the State of New Jersey and a member of the firm of Cassidy, Foss & San Filippo. We are the attorneys of record in the Superior Court of New Jersey Law Division in the matter of Alexander v. Alqaisi, et al. and therefore I am thoroughly familiar with the facts surrounding that lawsuit brought by Karen F. Alexander, the plaintiff in this case.

2. On July 13, 1994 a complaint was filed in Superior Court of New Jersey Law Division brought by Karen Alexander for the injury and death of her daughter on July 15, 1992. Attached

hereto and marked as Exhibit A is copy of the complaint that was filed in the Superior Court on July 13, 1994. That complaint has since been amended. In that case Karen Alexander is a plaintiff in three different capacities. She is the administrator ad prosequendum with respect to a wrongful death action for the death of her daughter. She is the general administrator of the estate of her daughter in bringing the survival action and she is a plaintiff in her individual capacity seeking damages for emotional stress as a result of the negligence of the defendants in that case.

3. In October, 1994 the Surrogate of Monmouth County refused the plaintiff's request for the issuance of letters of general administration and letters appointing Karen Alexander the administratrix ad prosequendum of the estate of her daughter. Copies of two letters that I received from the Surrogate's office are attached hereto and marked as Exhibits B and C.

4. I am a certified civil trial attorney in the State of New Jersey and I devote all of my time to civil trial and appellate litigation. Since my admission to the practice of law in New Jersey in 1975 the substantial majority of my civil practice has been related to personal injury matters including products liability claims, medical malpractice and ordinary negligence. As a result I have handled dozens of death cases over the years. It is not uncommon that survival action cases will be tried where the pain that was suffered by the plaintiff's decedent lasted a matter of minutes and even seconds. I have tried at least two cases where the proofs relative to the survival action showed that the decedent was alive for less than a minute after the trauma, and in one instance, the child was alive only three to four seconds before death ensued. That experience, under New Jersey law, is compensable provided that proper proofs are put into evidence. Competent medical expert testimony is employed in these matters to establish the medical facts.

5. Over the years I have had numerous cases in which a mother was injured while pregnant. In many of these cases the children have died as a result of the tortious conduct. In my own cases I have seen an arbitrary pattern in which some mothers can recover in wrongful death and survival actions; and others cannot. The contrast is dramatic, even in matters I have recently resolved

or am currently handling. I recently resolved a case in which the child lived for only minutes after birth and the baby's mother received a full recovery for wrongful death and survival action claims. In contrast to that case, we resolved an auto accident case about seven months ago where there was no recovery for the death of the child because the baby died minutes before the mother reached the hospital. The baby was thirty-seven weeks gestational age. In stark contrast to the Alexander case, I am currently handling a case where the baby was injured in utero, was prematurely born at twenty-six weeks gestation and lived for a week or so before death. The mother in that case is entitled to full compensation under New Jersey law while Mrs. Alexander is not.

6. The claim of Mrs. Alexander for emotional distress brought in her individual capacity is a claim which is brought in every case and even those mothers who are allowed to recover in wrongful death, and survival actions may and do recover under the emotional distress claims.

/s/ Harold J. Cassidy, Esq.
Harold J. Cassidy, Esq.

Sworn and subscribed to me before me this 10th day of January, 1995, by Harold J. Cassidy

COUNTY OF MONMOUTH :

SS.

STATE OF NEW JERSEY :

/s/ Barbara Ann Kowaleski
Notary

Barbara-Ann Kowaleksi
A Notary Public in New Jersey
My Commission Expires July 5, 1999

MONMOUTH COUNTY
OFFICE OF THE SURROGATE

FRANCES SCULLEY
Deputy Surrogate

HALL OF RECORDS
P.O. Box 1265
FREEHOLD, NJ 07728-1265

HAZEL L. BOVE
Special Deputy Surrogate

MARIE S. MUHLER
SURROGATE

October 18, 1994

Cassidy, Foss & San Filippo
Counsellors at Law
P.O. Box 896
Red Bank, NJ 07701-0986

Attention: Harold J. Cassidy, Esq.

RE: Alexander v. Alquaisi, et al. Docket No.L-3896-94

Dear Mr. Cassidy;

All the facts you list in detail, regarding the above matter, have been carefully researched. Your request for the appointment of Karen F. Alexander as Administratrix ad Prosequendum, in a wrongful death action, must be denied.

The Surrogate is authorized to grant Letters of Administration Ad Prosequendum upon the estate of those who died a resident of the County, or died in the County and litigation is necessary. Usually, the application is accompanied by a Certificate of Death, or other competent proof.

Unfortunately, as a result of the medical malpractice, the baby Mrs. Alexander was carrying was stillborn. Therefore, neither a Birth Certificate or a Death Certificate could be issued.

Furthermore, under the circumstances and pursuant to the New Jersey Court Rules 4:80-1 and the New Jersey Statutes NJSA 38:10-11, this office regretfully denies the issuances of Letters of Administration Ad Prosequendum or general Letters of Administration in the above matter.

If there are any questions, please feel free to call.

Very truly yours,

/s/ Frances Sculley
Frances Sculley,
Deputy Surrogate

MONMOUTH COUNTY
OFFICE OF THE SURROGATE

FRANCES SCULLEY
Deputy Surrogate

HAZEL L. BOVE
Special Deputy Surrogate

HALL OF RECORDS
P.O. Box 1265
FREEHOLD, NJ 07728-1265

MARIE S. MUHLER
SURROGATE

October 31, 1994

Cassidy, Foss & San Filippo
Counsellors at Law
P.O. Box 896
Red Bank, NJ 07701-0986

Attention: Harold J. Cassidy, Esq.

RE: Alexander v. Alquaisi, et al. Docket No.L-3896-94

Dear Mr. Cassidy:

I regret to inform you that I must rescind my letter to you dated October 18th, 1994 and substitute this letter in its place.

All the facts you list in detail, in your letter to me on October 14th, 1994, have been carefully researched. Your request for the appointment of Karen F. Alexander as Administratrix ad Prosequendum, in a wrongful death action, must be denied.

The Surrogate is authorized to grant Letters of Administration Ad Prosequendum upon the estate of those who died a resident of the County, or died in the County and litigation is necessary. Usually, the Ad Pros application is accompanied by a Certificate of Death, or other competent proof.

Under the circumstances, pursuant to the New Jersey Court Rules 4:80-1 and the New Jersey Statutes NJSA 3B:10-11, this

office regretfully denies the issuance of Letters of Administration Ad Prosequendum in the above matter.

If there are any questions, please feel free to call.

Very truly yours,

/s/ Frances Sculley
Frances Sculley,
Deputy Surrogate

CASSIDY, FOSS & SAN FILLIPO
225 Broad St.
P.O. Box 280
Red Bank, NJ 07701
(908) 741-2525
Attorneys for Plaintiff

GERTLER AND HANNA, P.C.
1928 Highway 35
Wall, New Jersey 07719
(908) 449-8000
Co-Counsel

SUPERIOR COURT OF NEW JERSEY KAREN F. ALEXANDER, Individually; KAREN F. ALEXANDER, as Administratrix ad Prosequendum of the Estate of Baby Girl Alexander; KAREN F. ALEXANDER, General Administratrix of the Estate of Baby Girl Alexander Plaintiff(s), v. ILHAM ALQAISI, M.D.; CHARLES HUX, M.D.; JERSEY SHORE PERINATAL INSTITUTE, a partnership; DR. CHERON, M.D.; DR. JOSEPH CANTERINO, M.D.; DR. JOHN DOE, a fictitious name of a real individual; N. STRZELECKI, R.N.; S. GROWHOWSKI, R.C.; CHRISTINE W. GERRIATEN, R.N.; PRISCILLA WRIGHT, L.P.N.; JACQUELINE FREDERIQUE, L.P.N.; BARBARA L. MOORE, R.N.C.; JANE ROE and JANE DOE, fictitious names of real individuals; JERSEY SHORE MEDICAL CENTER, a corporation organized under the laws of	: SUPREME COURT OF NEW JERSEY : MONMOUTH COUNTY : LAW DIVISION : DOCKET NO. L-3896-94-MM : **Civil Action** : **AMENDED MEDICAL MALPRACTICE COMPLAINT AND JURY DEMAND**

the State of New Jersey :
:
Defendant(s). :
_____:

Plaintiffs, Karen Alexander, individually, Karen Alexander, as Administratrix ad Prosequendum of the Estate of Baby Girl Alexander and Karen Alexander, as General Administratrix of the Estate of Baby Girl Alexander, residing at 718 Walling Avenue in the Borough of South Belmar, County of Monmouth, and State of New Jersey, by way of complaint against the defendants, say:

FIRST COUNT

1. At all times relevant hereto the defendant, Ilham Alqaisi, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held herself out as having expertise in the area of obstetrics and gynecology and held herself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes her attention to the specialty of obstetrics and gynecology. In holding herself out as a physician devoted to practice obstetrics and gynecology and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally attended by a doctor with such specialty, Ilham Alqaisi, M.D. was retained by the plaintiff, Karen F. Alexander, for the care and treatment of herself and her child and for the safety in the management, care of the pregnancy, labor and delivery of her child.

2. At all times relevant hereto the defendant, Charles Hux, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held himself out as having expertise in the area of obstetrics and gynecology and held himself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes his attention to the specialty of obstetrics and gynecology and specialist in internal and fetal medicine. In holding himself out as a physician devoted to practice obstetrics and gynecology and specialist in internal and fetal medicine and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally

attended by a doctor with such specialty, Charles Hux, M.D. was retained by the plaintiff, Karen F. Alexander, for the care and treatment of herself and her child and for the safety in the management, care of the pregnancy, labor and delivery of her child.

3. At all times relevant hereto the defendant Jersey Shore Perinatal Institute was a legal entity organized under the laws of the State of New Jersey in which defendant, Charles Hux, M.D. was a partner. As such, the defendant, Jersey Shore Perinatal Institute, is liable for the negligent acts of Charles Hux, M.D.

4. At all times relevant hereto the defendant, Dr. Cheron, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held himself out as having expertise in the area of obstetrics and gynecology and held himself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes his attention to the specialty of obstetrics and gynecology and specialist in internal and fetal medicine. In holding himself out as a physician devoted to practice obstetrics and gynecology and specialist in internal and fetal medicine and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally attended by a doctor with such specialty, Dr. Cheron, M.D. was retained by the plaintiff, Karen F. Alexander, for the care and treatment of herself and her child and for the safety in the management, care of the pregnancy, labor and delivery of her child.

5. At all times relevant hereto the defendant, Dr. Canterino, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held himself out as having expertise in the area of obstetrics and gynecology and held himself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes his attention to the specialty of obstetrics and gynecology. In holding himself out as a physician devoted to practice obstetrics and gynecology and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally attended by a doctor with such specialty, Dr. Canterino, M.D. was retained by the plaintiff, Karen F. Alexander,

for the care and treatment of herself and her child and for the safety in the management, care of the pregnancy, labor and delivery of her child.

6. At all times relevant hereto the defendant, Dr. John Doe, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held himself out as having expertise in the area of obstetrics and gynecology and held himself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes his attention to the specialty of obstetrics and gynecology. In holding himself out as a physician devoted to practice obstetrics and gynecology and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally attended by a doctor with such specialty, Dr. John Doe, M.D. was retained by the plaintiff, Karen F. Alexander, for the care and treatment of herself and her child and for the safety in the management, care of the pregnancy, labor and delivery of her child.

7. On or about July 15, 1992 the plaintiff, Karen F. Alexander, was admitted by defendant, Ilham Alqaisi, M.D., to the hospital owned, operated and controlled by the defendant, Jersey Shore Medical Center, a corporation organized under the laws of the State of New Jersey.

8. At all relevant times during the hospitalization at Jersey Shore Medical Center beginning on July 15, 1992 and continuing until her discharge the plaintiff was under the care of the defendants Dr. Alqaisi, Dr. Hux, Jersey Shore Perinatal Institute,, Dr. Cheron, Dr. Canterino and Dr. John Doe. These defendants, each and all of them, were physicians specializing in obstetrics and gynecology (and in the case of Dr. Hux and Jersey Shore Perinatal Institute specialists in maternal and fetal medicine) and each and all of them were retained by the plaintiff for the purpose of receiving medical treatment. While acting in the physician/patient relationship with the plaintiff, Karen F. Alexander, these defendants, each and all of them, owed a duty of care to the plaintiff to treat as a physician with a specialty in obstetrics and gynecology and fetal and maternal medicine to perform within the acceptable standards of a physician practicing in these areas of expertise.

9. At all times relevant hereto, the plaintiff, Karen F. Alexander, and her child, Baby Girl Alexander, were relying on the expertise, care and skill of these defendants, each and all of them, to act within acceptable standards and to perform to the acceptable standards of a physician practicing in these areas of specialty.

10. On July 15, 1992, these six defendants, each and all of them, attempted the delivery of Karen F. Alexander's child, the infant referred to herein as Baby Girl Alexander. These defendants, each and all of them, failed to exercise that degree of care and skill normal to physicians who devote their attention to these specialties that defendants held themselves out to practice. In all phases of the treatment of Karen F. Alexander and her infant child during this period of hospitalization, treatment during pregnancy, labor and delivery these defendants, each and all of them, breached their duty owing to the plaintiff to exercise that degree of skill exercised by others of the same profession and deviated from that degree of skill, knowledge and care exercised by others in the same profession and did so to the severe detriment to the plaintiff, Karen F. Alexander and Baby Girl Alexander the infant.

11. As a direct and proximate result and negligence of these defendants, each and all of them, the infant, Baby Girl Alexander, was caused pain and suffering and caused to die and the plaintiff, Karen F. Alexander, suffered severe trauma, both physical and mental, as a result of the negligence of the defendants in causing trauma, pain, suffering and the death of Baby Girl Alexander. As a further and proximate result of the negligence of these defendants, the plaintiff, Karen Alexander, has been caused injuries, both temporary and permanent in nature, and she has been caused to endure and will in the future endure severe pain and suffering and costs of expenditures of money for hospital, medical and nursing care.

WHEREFORE, the plaintiff, Karen F. Alexander, individually, demands judgment on this count jointly and severally against the defendants, Ilham Alqaisi, M.D., Dr. Charles Hux, M.D., Jersey Shore Perinatal Institute; Dr. Cheron, M.D., Dr. Joseph Canterino,

M.D., and Dr. John Doe, M.D. for damages, together with interest and costs of suit.

SECOND COUNT

1. The allegations of the First Count are repeated and incorporated by references with the same force and effect as if set forth at length herein.

2. At all times relevant hereto the defendants, N. Strzelecki, R.N.; S. Growhowski, R.C.; Christine W. Gerriaten, R.N.; Priscilla Wright, L.P.N.; Jacqueline Frederique, L.P.N.; Barbara L. Moore, R.N.C.; Jane Roe and Jane Doe, fictitious names of real individuals, were licensed nurses employed by the defendant, Jersey Shore Medical Center, who were involved in the care and treatment of the plaintiff, Karen F. Alexander, and her child, Baby Girl Alexander at the Jersey Shore Medical Center on or about July 15, 1992 and each and all of them were health care specialist in the State of New Jersey who held themselves out as trained labor, delivery and surgical nurses with the skills of nurses who practice in these areas of expertise.

3. On or about July 15, 1992 the plaintiff, Karen F. Alexander, employed these defendants, each and all of them, in a nurse/patient relationship, to assist in the treatment and care of her physical condition and that of her infant, Baby Girl Alexander. On July 15, 1992, the plaintiff, Karen F. Alexander, gave birth to Baby Girl Alexander, who sustained injury, pain, suffering and death as a result of the negligence of each and all of the defendants named in this count. Attending to the plaintiff, Karen F. Alexander, in the care and management of the labor and surgery and matters pertaining to the diagnosis and care of her treatment at all tmes pertinent to labor and delivery, these defendants, each and al of them individually and collectively, were negligent and each failed to exercise that degree of skill, care and diligence as is reasonable and ordinary for members of the nursing profession who are engaged in practice at a professional level such as that which the defendants were then engaged.

4. As a direct and proximate result of the negligence of the defendants, N. Strzelecki, R.N.; S. Growhowski, R.C.; Christine

W. Gerriaten, R.N.; Priscilla Wright, L.P.N.; Jacqueline Frederique, L.P.N.; Barbara L. Moore, R.N.C.; Jane Roe and Jane Doe, fictitious names of real individuals, the infant of the plaintiff, Baby Girl Alexander, suffered severe physical injuries and distress which caused the pain, suffering and death of Baby Girl Alexander and the physical and mental trauma to Karen F. Alexander which inflicted mental and physical injuries to Karen F. Alexander, both temporary and permanent in nature and compelled her to undergo treatment, and forced her to endure in the past and will endure in the future severe pain and suffering and in the future will prevent her from performing all of her usual duties and activities commonly and usually enjoyed by the plaintiff. As a proximate result of negligence of these defendants plaintiff, Karen F. Alexander, has been obligated to seek care and treatment and has been caused to spend considerable sums of money for hospital and medical care and will be compelled to spend additional sums of money for medical care in the future.

WHEREFORE, the plaintiff, Karen F. Alexander, individually, demands judgment against the defendants, N. Strzelecki, R.N.; S. Growhowski, R.C.; Christine W. Gerriaten, R.N.; Priscilla Wright, L.P.N.; Jacqueline Frederique, L.P.N.; Barbara L. Moore, R.N.C.; Jane Roe and Jane Doe, fictitious names of real individuals, for damages together with interest and costs of suit.

THIRD COUNT

1. The allegations of the First and Second Counts are repeated and incorporated by references with the same force and effect as if set forth at length herein.

2. At all times relevant hereto defendants Cheron, Canterino, Dr. John Doe, Wright, Frederique, Moore, Strzelecki, Growhowski, Gerriaten, Jane Roe and Jane Doe, were agents and employees of the defendant, Jersey Shore Medical Center. At all times relevant hereto the defendant, Jersey Shore Medical Center was a corporation organized under the laws of the State of New Jersey and operated a hospital located in Neptune, New Jersey, dedicated to providing competent medical care and treatment to persons admitted to the hospital.

3. The defendant, Jersey Shore Medical Center held itself out into the public as a hospital skilled in the care of patients and skilled in caring for people who are suffering for illnesses or who need medical attention or care. By reason thereof, the defendant hospital was employed by the plaintiff, Karen F. Alexander, for the purpose of caring for herself and Baby Girl Alexander and by virtue of such employment defendant Jersey Shore Medical Center did agree to carefully and skillfully attend the plaintiff and Baby Girl Alexander and provide proper treatment and care to each and both of them.

4. On or about December 15, 1992 the plaintiff, Karen F. Alexander, was admitted to Jersey Shore Medical Center's maternity ward for labor and delivery of Baby Girl Alexander. During the course of said labor and delivery the defendant, Jersey Shore Medical Center, through its agents, servants and employees who were attending the plaintiff and Baby Girl Alexander failed to exercise that degree of skill, care and diligence as is reasonable for similar employees of hospitals who are engaged in the operation of a fully accredited hospital for the treatment of disease and surgery including the management and care of labor and delivery of babies.

5. As a direct and proximate result of the negligence and carelessness of the defendant, Jersey Shore medical Center, its agents, servants and employees, the infant, Baby Girl Alexander suffered severe mental and physical injuries resulting in pain, suffering and death of Baby Girl Alexander and which caused the plaintiff, Karen F. Alexander, to sustain both physical and mental trauma which caused her to endure and she will continue to endure severe pain and suffering and shall prevent Karen F. Alexander from performing her usual activities and from engaging in activities normally and usually enjoyed by her. As a further proximate result of the negligence of the defendant hospital, its agents, servants and employees the plaintiff, Karen F. Alexander has been caused to spend sums of money for hospital and medical care and will be forced to spend such sums of money in the future.

6. The injuries to the plaintiff, Karen F. Alexander, and the death of Baby Girl Alexander, as alleged, were the direct and proximate result of the negligence of the employees, agents and

servants of defendant hospital who were then acting within the scope and course of their employment.

WHEREFORE, the plaintiff, Karen F. Alexander, individually demands judgment on this count against the defendant, Jersey Shore Medical Center for damages together with interest and cost of suit.

FOURTH COUNT

1. The allegations of the First, Second and Third Counts are repeated and incorporated by references with the same force and effect as if set forth at length herein.

2. Karen F. Alexander is the natural mother of the decedent, Baby Girl Alexander, who was a full term (nine month old) baby prior to birth.

3. As a direct result of the suffering and death of the decedent, Baby Girl Alexander, the plaintiff, Karen Alexander, suffered extreme emotional distress and mental suffering.

4. As a direct result of the breach of duty and negligence of each and all the defendant, individually and jointly, the plaintiff, Karen F. Alexander, suffered permanent emotional and psychological injury, pain and suffering and impairment of her normal activities, all of which existed since July 15, 1992 and shall continue in the future.

WHEREFORE, the plaintiff, Karen F. Alexander, demands judgment, jointly and severally, as the natural mother of the decedent, Baby Girl Alexander, against the defendants, Ilham Alqaisi, M.D., Dr. Charles Hux, M.D., Jersey Shore Perinatal Institute; Dr. Cheron, M.D., Dr. Joseph Canterino, M.D., and Dr. John Doe, M.D., N. Strzelecki, R.N.; S. Growhowski, R.C.; Christine W. Gerriaten, R.N.; Priscilla Wright, L.P.N.; Jacqueline Frederique, L.P.N.; Barbara L. Moore, R.N.C.; Jane Roe and Jane Doe, fictitious names of real individuals, for damages, together with interests and costs of suit.

FIFTH COUNT

(Wrongful Death)

1. The allegations of the First, Second, Third and Fourth Counts are repeated and incorporated by references with the same force and effect as if set forth at length herein.

2. Baby Girl Alexander leaves surviving her the plaintiff, Karen F. Alexander, and her husband Derek Alexander, the natural parents of Baby Girl Alexander. Both of them have sustained pecuniary and other losses as a result of the death of Baby Girl Alexander and have been deprived of the benefits of the relationship with their child .

3. This action is commenced within two years after the date of the death of Baby Girl Alexander and within two years of the date of the negligence of the defendants, each and all of them.

4. Letters appointing Karen F. Alexander Administratrix ad Prosequendum of the Estate of Baby Girl Alexander have been issued.

5. On or about July 15, 1992, Baby Girl Alexander was a full-term baby due to be born on or about July 15, 1992 to the plaintiff, Karen F. Alexander. During the course of labor and delivery, Baby Girl Alexander, sustained injury and distress resulting in pain and suffering experienced by Baby Girl Alexander, all of which resulted in the death of Baby Girl Alexander.

6. At all times relevant hereto the defendant, Charles Hux, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held himself out as having expertise in the area of obstetrics and gynecology and held himself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes his attention to the specialty of obstetrics and gynecology and specialist in internal and fetal medicine. In holding himself out as a physician devoted to practice obstetrics and gynecology and specialist in internal and fetal medicine and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally attended by a doctor with such specialty, Charles Hux, M.D. was retained by the plaintiff, Baby Girl Alexander, for the care and

treatment of herself and for the safety in the management, care of the pregnancy, labor and delivery of her.

7. At all times relevant hereto the defendant, Ilham Alqaisi, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held herself out as having expertise in the area of obstetrics and gynecology and held herself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes her attention to the specialty of obstetrics and gynecology. In holding herself out as a physician devoted to practice obstetrics and gynecology and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally attended by a doctor with such specialty, Ilham Alqaisi, M.D. was retained by the plaintiff, Karen F. Alexander, for the care and treatment of herself and her child and for the safety in the management, care of the pregnancy, labor and delivery of her child.

8. At all times relevant hereto the defendant Jersey Shore Perinatal Institute was a legal entity organized under the laws of the State of New Jersey in which defendant, Charles Hux, M.D. was a partner. As such, the defendant, Jersey Shore Perinatal Institute, is liable for the negligent acts of Charles Hux, M.D.

9. At all times relevant hereto the defendant, Dr. Cheron, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held himself out as having expertise in the area of obstetrics and gynecology and held himself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes his attention to the specialty of obstetrics and gynecology and specialist in internal and fetal medicine. In holding himself out as a physician devoted to practice obstetrics and gynecology and specialist in internal and fetal medicine and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally attended by a doctor with such specialty, Dr. Cheron, M.D. was retained by the plaintiff, Baby Girl Alexander, for the care and treatment of herself and for the safety in the management, care of the pregnancy, labor and delivery of her.

10. At all times relevant hereto the defendant, Dr. Canterino, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held himself out as having expertise in the area of obstetrics and gynecology and held himself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes his attention to the specialty of obstetrics and gynecology. In holding himself out as a physician devoted to practice obstetrics and gynecology and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally attended by a doctor with such specialty, Dr. Canterino, M.D. was retained by the plaintiff, Baby Girl Alexander, for the care and treatment of herself and for the safety in the management, care of the pregnancy, labor and delivery of her.

11. At all times relevant hereto the defendant, Dr. John Doe, M.D. was a doctor licensed to practice medicine in the State of New Jersey and who held himself out as having expertise in the area of obstetrics and gynecology and held himself out as a doctor who possessed that degree of skill, ability and knowledge normal to a physician who devotes his attention to the specialty of obstetrics and gynecology. In holding himself out as a physician devoted to practice obstetrics and gynecology and as one specially trained in the diagnosis and treatment of disorders, conditions and procedures normally attended by a doctor with such specialty, Dr. John Doe, M.D. was retained by the plaintiff, Baby Girl Alexander, for the care and treatment of herself and for the safety in the management, care of the pregnancy, labor and delivery of her.

12. On or about July 15, 1992 the plaintiff, Karen F. Alexander and Baby Girl Alexander were admitted by defendant, Ilham Alqaisi, M.D., to the hospital owned, operated and controlled by the defendant, Jersey Shore Medical Center, a corporation organized under the laws of the State of New Jersey.

13. At all relevant times during the hospitalization at Jersey Shore Medical Center beginning on July 15, 1992 and continuing until her discharge the plaintiff was under the care of the defendants Dr. Alqaisi, Dr. Hux, Jersey Shore Perinatal Institute,, Dr. Cheron, Dr. Canterino and Dr. John Doe. These defendants, each and all of them, were physicians specializing in obstetrics and gynecology (and in the case of Dr. Hux and Jersey

Shore Perinatal Institute specialists in maternal and fetal medicine) and each and all of them were retained by the plaintiff for the purpose of receiving medical treatment. While acting in the physician/patient relationship with the plaintiff, Karen F. Alexander and Baby Girl Alexander, these defendants, each and all of them, owed a duty of care to the plaintiffs to treat as a physician with a specialty in obstetrics and gynecology and fetal and maternal medicine to perform within the acceptable standards of a physician practicing in these areas of expertise.

14. At all times relevant hereto, the plaintiff, Karen F. Alexander, and her child, Baby Girl Alexander, were relying on the expertise, care and skill of these defendants, each and all of them, to act within acceptable standards and to perform to the acceptable standards of a physician practicing in these areas of specialty.

15. On July 15, 1992, these six defendants, each and all of them, attempted the delivery of the infant referred to herein as Baby Girl Alexander. These defendants, each and all of them, failed to exercise that degree of care and skill normal to the physician who devotes his or her attention to these specialties that defendants held themselves out to practice. In all phases of the treatment of Karen F. Alexander and the infant child during this period of hospitalization, treatment during pregnancy, labor and delivery these defendants, each and all of them, breached their duty owing to the plaintiff to exercise that degree of skill exercised by others of the same profession and deviated from that degree of skill, knowledge and care exercised by others in the same profession and did so to the severe detriment to Baby Girl Alexander, the infant.

16. As a direct and proximate result of the negligence of these defendants, each and all of them, the infant, Baby Girl Alexander, was caused to die and the plaintiff, Karen F. Alexander, suffered severe trauma, both physical and mental, as a result of the negligence of the defendants in causing the death of Baby Girl Alexander. As a further and proximate result of the negligence of these defendants, the plaintiff, Karen Alexander, has been caused injuries, both temporary and permanent in nature, and she has been caused to endure and will in the future endure severe pain

and suffering and costs of expenditures of money for hospital, medical and nursing care.

WHEREFORE, the plaintiff, Karen F. Alexander, as Administratrix ad Prosequendum of the Estate of Baby Girl Alexander demands judgment on this count against the defendants, jointly and severally, Ilham Alqaisi, M.D., Dr. Charles Hux, M.D., Jersey Shore Perinatal Institute; Dr. Cheron, M.D., Dr. Joseph Canterino, M.D., and Dr. John Doe, M.D. for damages, together with interest and costs of suit.

SIXTH COUNT
(Wrongful Death)

1. The allegations of the First, Second, Third, Fourth and Fifth Counts are repeated and incorporated by references with the same force and effect as if set forth at length herein.

2. This complaint was brought within two years of the death of Baby Girl Alexander.

3. Baby Girl Alexander leaves surviving her the plaintiff Karen F. Alexander and Derek Alexander, the natural parents of Baby Girl Alexander. Both of them sustained pecuniary and other losses as a result of the death of Baby Girl Alexander and have been deprived of their relationship with Baby Girl Alexander and value of the services and usual benefits that are realized from that relationship.

4. Letters appointing Karen F. Alexander Administratrix ad Prosequendum of the Estate of Baby Girl Alexander have been issued.

5. At all times relevant hereto the defendants, N. Strzelecki, R.N.; S. Growhowski, R.C.; Christine W. Gerriaten, R.N.; Priscilla Wright, L.P.N.; Jacqueline Frederique, L.P.N.; Barbara L. Moore, R.N.C.; Jane Roe and Jane Doe, fictitious names of real individuals, were licensed nurses employed by the defendant, Jersey Shore Medical Center, who were involved in the care and treatment of the plaintiff, Baby Girl Alexander, at the Jersey Shore Medical Center on or about July 15, 1992 and were

then and now the health care specialist in the State of New Jersey.

6. On or about July 15, 1992 the plaintiff, Karen F. Alexander and Baby Girl Alexander, employed these defendants, each and all of them, in a nurse/patient relationship, to assist in the treatment and care of their physical condition. On July 15, 1992, the plaintiff, Karen F. Alexander, gave birth to Baby Girl Alexander, who died as a result of the negligence of each and all of the defendants, including those named in this count, attending to the plaintiffs, Karen F. Alexander and Baby Girl Alexander, in the care and management of the labor and surgery and matters pertaining to the diagnosis and care of the baby's treatment at all times pertinent to labor and delivery, these defendants, each and all of them individually and collectively, were negligent and each failed to exercise that degree of skill, care and diligence as is reasonable and ordinary for members of the nursing profession who are engaged in practice at a professional level such as that which the defendants were then engaged.

7. As a direct and proximate result of the negligence of the defendants, N. Strzelecki, R.N.; S. Growhowski, R.C.; Christine W. Gerriaten, R.N.; Priscilla Wright, L.P.N.; Jacqueline Frederique, L.P.N.; Barbara L. Moore, R.N.C.; Jane Roe and Jane Doe, the plaintiff, Baby Girl Alexander, suffered severe physical injuries and distress which caused the pain, suffering and death of Baby Girl Alexander and the physical and mental trauma to Karen F. Alexander which inflicted mental and physical injuries to Karen F. Alexander, both temporary and permanent in nature and compelled her to undergo treatment, and forced her to endure in the past and will endure in the future severe pain and suffering and in the future will prevent her from performing all of her usual duties and activities commonly and usually enjoyed by the plaintiff.

WHEREFORE, the plaintiff, Karen F. Alexander Administratrix ad Prosequendum demands judgment against the defendants, jointly and severally, N. Strzelecki, R.N.; S. Growhowski, R.C.; Christine W. Gerriaten, R.N.; Priscilla Wright, L.P.N.; Jacqueline Frederique, L.P.N.; Barbara L. Moore, R.N.C.; Jane Roe and Jane Doe, fictitious names of real individuals, for damages together with interest and costs of suit.

SEVENTH COUNT
(Wrongful Death)

1. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Counts are repeated and incorporated by references with the same force and effect as if set forth at length herein.

2. This complaint was brought within two years of the death of Baby Girl Alexander.

3. Baby Girl Alexander leaves surviving her the plaintiff Karen F. Alexander and Derek Alexander, the natural parents of Baby Girl Alexander. Both of them sustained pecuniary and other losses as a result of the death of Baby Girl Alexander and have been deprived of their relationship with Baby Girl Alexander and value of the services and usual benefits that are realized from that relationship.

4. Letters appointing Karen F. Alexander Administratrix ad Prosequendum of the Estate of Baby Girl Alexander have been issued.

5. At all times relevant hereto defendants Cheron, Canterino, Dr. John Doe, Wright, Frederique, Moore, Strzelecki, Growhowski, Gerriaten, Jane Roe and Jane Doe, were agents and employees of the defendant, Jersey Shore Medical Center. At all times relevant hereto the defendant, Jersey Shore Medical Center was a corporation organized under the laws of the State of New Jersey and operated a hospital located in Neptune, New Jersey, dedicated to providing competent medical care and treatment to persons admitted to the hospital.

6. The defendant, Jersey Shore Medical Center held itself out into the public as a hospital skilled in the care of patients and skilled in caring for people who are suffering for illnesses or who need medical attention or care. By reason thereof, the defendant hospital was employed by the plaintiff, Karen F. Alexander and Baby Girl Alexander, for the purpose of caring for herself and Baby Girl Alexander and by virtue of such employment did defendant, Jersey Shore Medical Center did agree to carefully

and skillfully attend the plaintiff and Baby Girl Alexander enter into proper treatment and care to each and both of them.

7. On or about July 15, 1992 the plaintiff, Karen F. Alexander, was admitted to Jersey Shore Medical Center's maternity ward for labor and delivery of Baby Girl Alexander. During the course of said labor and delivery the defendant, Jersey Shore Medical Center, through its agents, servants and employees who were attending the plaintiff and Baby Girl Alexander failed to exercise that degree of skill, care and diligence as is reasonable nor know for similar employees of hospitals who are engaged in the operation of a fully accredited hospital for the treatment of disease and surgery including the management and care of labor and delivery of babies.

8. As a direct and proximate result of the negligence and carelessness of the defendant, Jersey Shore medical Center, its agents, servants and employees, the infant, Baby Girl Alexander suffered severe physical injuries resulting in the pain, suffering and death of Baby Girl Alexander and which caused the plaintiff, Karen F. Alexander, to sustain both physical and mental trauma which caused her to endure and she will continue to endure severe pain and suffering and shall prevent Karen F. Alexander from performing her usual activities and from engaging in activities normally and usually enjoyed by her. As a further proximate result of the negligence of the defendant hospital, its agents, servants and employees the plaintiff, Karen F. Alexander has been caused to spend sums of money for hospital and medical care and will be forced to spend such sums of money in the future.

9. The injuries to the plaintiff, Karen F. Alexander, and the death of Baby Girl Alexander, as alleged, were the direct and proximate result of the negligence of the employees, agents or servants of defendant hospital who were then acting within the scope and course of their employment.

WHEREFORE, the plaintiff, Karen F. Alexander Administratrix ad Prosequendum of the Estate of Baby Girl Alexander demands judgment on this count against the defendant, Jersey Shore Medical Center for damages together with interest and cost of suit.

EIGHTH COUNT
(Survival Action)

1. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Counts are repeated and incorporated by references with the same force and effect as if set forth at length herein.

2. Baby Girl Alexander leaves surviving her the plaintiffs, Karen F. Alexander and Derek Alexander, her natural parents, both of him have sustain pecuniary and other losses as a result of the death of Baby Girl Alexander.

3. This action is commenced within two years after the death of Baby Girl Alexander.

4. On or about July 15, 1992 Baby Girl Alexander was a full nine-month old child due to be born on or about July 15, 1992. As a result of the negligence of the defendants as set forth above, Baby Girl Alexander was caused to sustain injury, pain and suffering prior to death and prior to the completion of a cesarian section on July 15, 1992.

5. As a direct and proximate result of the negligence of the defendants Dr. Alqaisi, Dr. Hux, Jersey Shore Perinatal Institute,, Dr. Cheron, Dr. Canterino and Dr. John Doe, individually and collectively, jointly and severally, the decedent's parents, Karen and Derek Alexander, have lost the comfort, society, counsel and their relationship with their child and have been deprived of the normal customary and usual relationship with the child including pecuniary losses resulting from the loss of services, counsel, companionship and all those interactions, services and activities and exchanges between children and parent compensable between parents and children under the laws of the State of New Jersey.

WHEREFORE, the plaintiff, Karen F. Alexander as General Administratrix of the Estate of Baby Girl Alexander demands judgment on this count against the defendants, Dr. Alqaisi, Dr. Hux, Jersey Shore Perinatal Institute,, Dr. Cheron, Dr. Canterino

and Dr. John Doe, for damages together with interests and costs of suit.

NINTH COUNT
(Survival Action)

1. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Counts are repeated and incorporated by references with the same force and effect as if set forth at length herein.

2. Baby Girl Alexander leaves surviving her the plaintiffs, Karen F. Alexander and Derek Alexander, her natural parents, all of them having sustained pecuniary and other losses as a result of the death of Baby Girl Alexander.

3. This action is commenced within two years after the death of Baby Girl Alexander.

4. On or about July 15, 1992 Baby Girl Alexander was a full nine-month old child due to be born on or about July 15, 1992 as a result of the negligence of the defendants as set forth above, Baby Girl Alexander was caused to sustain injury, pain and suffering prior to death and prior to the completion of a cesarian section on July 15, 1992.

5. As a direct and proximate result of the negligence of the defendants Dr. Alqaisi, Dr. Hux, Jersey Shore Perinatal Institute, Dr. Cheron, Dr. Canterino and Dr. John Doe, individually and collectively, jointly and severally, the decedent's parents, Karen and Derek Alexander, have lost the comfort, society, counsel and their relationship with their child and have been deprived of the normal customary and usual relationship with the child including pecuniary losses resulting from the loss of services, counsel, companionship and all those interactions, services and activities and exchanges between children and parent compensable between parents and children under the laws of the State of New Jersey.

WHEREFORE, the plaintiff, Karen F. Alexander as General Administratrix of the Estate of Baby Girl Alexander demands

judgment on this count against the defendants, N. Strzelecki, R.N.; S. Growhowski, R.C.; Christine W. Gerriaten, R.N.; Priscilla Wright, L.P.N.; Jacqueline Frederique, L.P.N.; Barbara L. Moore, R.N.C.; Jane Roe and Jane Doe, fictitious names of real individuals, for damages together with interests and costs of suit.

TENTH COUNT
(Survival Action)

1. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Counts are repeated and incorporated by references with the same force and effect as if set forth at length herein.

2. Baby Girl Alexander leaves surviving her the plaintiffs, Karen F. Alexander and Derek Alexander, her natural parents, all of them having sustained pecuniary and other losses as a result of the death of Baby Girl Alexander.

3. This action is commenced within two years after the death of Baby Girl Alexander.

4. On or about July 15, 1992 Baby Girl Alexander was a full nine-month old child due to be born on or about July 15, 1992 as a result of the negligence of the defendants as set forth above, Baby Girl Alexander was caused to sustain injury, pain and suffering prior to death and prior to the completion of a cesarian section on July 15, 1992.

5. As a direct and proximate result of the negligence of the defendants Dr. Alqaisi, Dr. Hux, Jersey Shore Perinatal Institute, Dr. Cheron, Dr. Canterino and Dr. John Doe, individually and collectively, jointly and severally, the decedent's parents, Karen and Derek Alexander, have lost the comfort, society, counsel and their relationship with their child and have been deprived of the normal customary and usual relationship with the child including pecuniary losses resulting from the loss of services, counsel, companionship and all those interactions, services and activities and exchanges between children and parent compensable between parents and children under the laws of the State of New Jersey.

WHEREFORE, the plaintiff, Karen F. Alexander as General Administratrix of the Estate of Baby Girl Alexander demands judgment on this count against the defendants, Jersey Shore Medical Center, its agents, servants and employees, for damages together with interests and costs of suit.

CASSIDY, FOSS & SAN FILIPPO
Attorneys for Plaintiff

BY: /s/ Harold J. Cassidy
HAROLD J. CASSIDY, ESQ.

DATED:

JURY DEMAND

Plaintiff hereby demands a trial by jury on the above-captioned issues.

CASSIDY, FOSS & SAN FILIPPO
Attorneys for Plaintiff

BY: /s/ Harold J. Cassidy
HAROLD J. CASSIDY, ESQ.

DATED: August 8, 1997

CERTIFICATION

Pursuant to Rule 4:5-1, the undersigned counsel for plaintiff hereby certifies that no other court action or arbitration proceeding is currently pending or contemplated or the matter is in controversy as the same as or related to the subject matter of this action except that an action is contemplated to be filed in the Federal District court seeking declaratory and conjunctive relief

which may bear upon the rights of the litigants to this suit.

CASSIDY, FOSS & SAN FILIPPO
Attorneys for Plaintiff

BY: /s/ Harold J. Cassidy, Esq.
HAROLD

J. CASSIDY, ESQ.

DATED:

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street
P.O. Box 896
Red Bank, New Jersey 07701
(908) 741-2525
HJC/5217
Attorneys for Plaintiff

KAREN F. ALEXANDER, et al.,	HONORABLE MARY LITTLE PARELL
	Civil Action No. 94-5229
	AFFIDAVIT OF KAREN F. ALEXANDER IN SUPPORT OF PLAINTIFFS' NOTICE OF CROSS MOTION FOR SUMMARY JUDGMENT ON THE COUNTS OF THE COMPLAINT SEEKING DECLARATORY AND INJUNCTIVE RELIEF
Plaintiff(s),	
v.	
CHRISTINE TODD WHITMAN, et al.	
Defendant(s).	

Karen F. Alexander, being of full age, deposes and says:

1. I reside with my husband Derek at 718 Walling Avenue, So. Belmar, New Jersey. I am the plaintiff in this case in which I brought the complaint challenging the New Jersey wrongful death and survival action statutes on my own behalf and on behalf of the class of all mothers who have lost children whose death ensued before birth as a result of the tortious conduct of

third parties where the claims are properly brought within the state of New Jersey. I am also the plaintiff in a lawsuit currently pending in the law division of the Superior Court of New Jersey venued in Monmouth County which bears docket number L-3896-94. In that complaint I bring a wrongful death and survival action against various defendants because their tortious conduct resulted in injury, pain and the death of my daughter. A copy of the complaint that is filed with the superior court on July 13, 1994 is attached to a certification submitted by Harold Cassidy in support of this motion.

2. My daughter Kaylyn was born on July 15, 1992 at Jersey Shore Medical Center. I myself am employed at that hospital. Kaylyn died before birth by caesarean section. She was between her thirty-seventh and thirty-ninth week of gestation that day.

3. I attach to this certification, which is marked as Exhibit A, the death certificate of my daughter Kaylyn Elissa Alexander that was issued by the registrar of vital statistics on December 30, 1992. My husband and I had named our daughter Kaylyn Elissa Alexander which is reflected on her death certificate. The death certificate accurately reflects that my daughter died on July 15, 1992 and that she was "still born".

4. I also attach hereto which is marked as Exhibit B the autopsy report concerning the autopsy which was performed on my daughter Kaylyn beginning at 10:30 a.m. on July 18, 1992.

5. I was admitted to Jersey Shore Medical Center on July 15, 1992 at around 11:00 a.m. Attached hereto and marked as Exhibit C-1 is a copy of the admission form. I was not originally scheduled for a caesarean section birth, but was originally given Pitocin for vaginal delivery. Attached hereto and marked as Exhibit C-2 is a portion of the hospital chart which shows that my baby died before birth. The chart shows that under "condition" the baby had "intrapartum demise". It shows the baby's Apgar scores were 0-0 and the baby was therefore still born. It is consistent with my experience and what I was told by the doctor. Attached hereto and marked as Exhibit C-3 is a portion of the hospital chart of an infant cardio-respiratory arrest data sheet. It indicates that

from the moment of birth at 3:04 p.m. my daughter never had a pulse or respiration. Attached hereto and marked as Exhibit C-4 is a portion of the hospital record that indicates that my baby was ~~alive~~ and ~~had a heartbeat as late as 2:48 p.m., sixteen minutes~~ before birth.

6. I also attach hereto which is marked as Exhibit C a portion of the hospital records that have been certified to us as accurate. Marked as C-5 is page five of the nurse's notes of July 15, 1992 of my hospital chart including an entry of 5:30 p.m. I have a very specific recollection of the events of that day. While my husband Derek was with me and after we had learned that our daughter Kaylyn had died before birth I was asked if I wanted to see and hold my daughter. That was something that I had wanted to do for many months.

7. Of course I had felt Kaylyn kicking me and had the normal experience of any mother who has such a relationship with her child for a long time. The two of us have been through a lot together. I found I did want to hold her in my arms, even if it would be only one time. I asked for Kaylyn to be brought to me and the nurse was kind enough to do so. I held Kaylyn and studied her features, her little hands, and as much about her as I could. It was hard giving her up.

8. The hospital staff was kind enough to take pictures of Kaylyn and give them to me. I have decided to share them with the Court and I attach to this certification, marked as Exhibit D, the two photographs that were taken after her death on July 15, 1992. These pictures accurately depict how she looked on the day of her birth.

9. It is difficult to describe what it is like having lost Kaylyn, and once having had her in my life, and now no longer having her. I shall not try to do so in an affidavit except to say that although I never held Kaylyn until after she died, I knew her, felt her, communicated with her, and I loved her.

/s/ Karen F. Alexander
Karen F. Alexander

Sworn and subscribed to me before me this 6th day of January, 1995, by Karen F. Alexander.

/s/ Harold J. Cassidy, Esq.
Harold J. Cassidy, Esq.
Attorney at Law

STATE OF NEW JERSEY
OFFICE OF REGISTRAR OF VITAL STATISTICS
TOWNSHIP OF NEPTUNE

AMENDED:
7-27-92

This is to Certify that the following is correctly copied from a record of Death in my office.

NAME OF DECEASED	PLACE OF DEATH	DATE OF DEATH
KAYLYN-ELISSA ALEXANDER	Jersey Shore Med. Center	July 15, 1992

MARITAL CONDITION	AGE	OCCUPATION	CAUSE OF DEATH
Never Married	Still Born	-----	Cardio-vascular collapse

A-151

Pauline M. Speckman
Deputy Registrar of Vital Statistics

NEPTUNE, N. J.

December 30, 1992
Date of Issue

JERSEY SHORE MEDICAL CENTER
1945 RT. 33 NEPTUNE, NJ 07754
(908) 776-4148

AUTOPSY NO.	92-A-30
NAME/AGE	ALEXANDER, BABY GIRL (F)
HOSPITAL NO.	AP-9203 (0015779 - KAREN, MOTHER
ATTENDING PHYSICIAN(S)	ALQUAISI, ILHAM, M.D.
DATE/TIME OF DEATH:	STILLBORN 7/15/92
DATE/TIME OF AUTOPSY:	7/18/92; 10:30 A.M.
PROSECTOR	S. GOVIL, M.D.
TYPE OF AUTOPSY:	COMPLETE
MEDICAL EXAMINER	NO

PORTIONS OF FINAL ANATOMICAL DIAGNOSIS

Stillborn female baby (39 weeks gestation)
Primary atelectasis of lung, bilateral
Aspiration of amniotic fluid
Intra-alveolar hemorrhage, patchy
Focal hyperdistended alveoli and broncioles
Marked vascular congestion of thymus, meninges and spleen
Extramedullary hematopoiesis of liver
No congenital anomaly noted.

S. Govil, M.D.

SG/rmd

GROSS DESCRIPTION

EXTERNAL APPEARANCE:

The body is that of a well developed, well nourished female baby weighing 3,000 grams and measuring from crown to rump 33 cm and from crown to heel 51 cm. Rigor mortis and liver mortis is moderately developed. The head is of the expected size and the circumference of the head is 35 cm. The ocular bulbs are of the expected size and shape. The sclerae and conjunctivae are pale and clear and the pupils measure 0.6 cm in diameter. The ears, nose and mouth are normally formed. The trachea is in the midline and the thyroid gland is not palpated. The chest is symmetrically developed. The abdomen is symmetrically developed and is nonprotuberant. The back is unremarkable. The external genitalia are those of a female baby. No congenital anomaly of the spine is noted. The extremities are normally and symmetrically developed.

SECTION:

The usual Y shaped incision is made and modified Virchow technique is carried out. The skin is unremarkable. The panniculus adiposus measures 0.3 cm at the umbilicus and is pale yellow in color. The skeletal muscles are red-brown and generally intact. Exploration of the thorax reveals the thoracic viscera in their usual location. no free fluid is identified. The diaphragm extends to the fourth rib on the right side and the sixth rib on the left side. The heart as seen in situ does not appear enlarged. The lining surfaces are smooth and glossy. The thymus is identified in the anterior mediastinum and weights 15 grams (the normal weight 11 grams +/- 4 grams). Exploration of the abdomen reveals the abdominal viscera in their usual location. No ascitic fluid is noted.

CARDIOVASCULAR SYSTEM:

The heart weighs 20 grams (normal weight 21 +/- 4). The epicardial surfaces are generally smooth and glossy. The contour of the heart is well maintained. The myocardium is pale brown in color and is moderately flabby. The endocardial surfaces are smooth and glossy. The left ventricle measures 0.3 cm in thickness and the right ventricle measures 0.3 cm in thickness.

The component portions of the valves are unremarkable. The coronary arteries arise in their usual location and pursue their expected course.

AORTA:

The aorta arises in its usual location and pursues its expected course giving rise to the usual number of branches. No congenital anomaly of the main branches is noted. The ductus arteriosus is patent and measures 0.6 cm in its open circumference. The superior and inferior venae cavae and their branches are unremarkable.

RESPIRATORY SYSTEM:

The right and the left lungs appear solid and weigh 35 and 30 grams (normal combined weight is 55 +/- 13 grams). Sectioning through the parenchyma reveals a consolidated meaty cut surface. The intrapulmonary branches of the bronchial tree are unremarkable. The trachea and extrapulmonary bronchi are unremarkable. The pulmonary artery and pulmonary veins are also unremarkable.

LIVER AND GALLBLADDER:

The liver weights 130 grams (normal weight 155 +/- 33 grams). The capsule is smooth and tense. The shape and size of the liver is well maintained. Sectioning through the parenchyma reveals a pale tan, mildly friable cut surface. No abnormalities of the intrahepatic blood vessels is noted.

The gallbladder is not distended. The serosal surface is smooth. The wall is of the usual thickness and the mucosal surface is intact. The lumen contains a few cc of limpid green bile. The cystic and extrahepatic biliary systems are patent throughout and the common duct empties into the duodenum at the papilla of Vater.

PANCREAS:

The pancreas is of expected size and shape. Routine serial sections reveal the usual lobular architecture. The pancreatic duct is patent and empties into the duodenum at the papilla of Vater.

SPLEEN:

The spleen weights 15 grams (normal 10 +/- 4). The capsule is smooth and dull purple. Sectioning through the parenchyma reveals a mildly resilient cut surface.

ADRENALS:

The adrenals are of expected size and shape and, on section, show the usual yellow-orange cortex and gray-white medulla in the expected relationships.

GENITOURINARY SYSTEM:

The right and left kidney weights 10 grams and 12 grams, respectively (normal combined weight 25 +/- 5 grams). Their capsules strip from the surface easily revealing the lobulated cortical surface. Sectioning through the parenchyma reveals the usual corticomedullary relationships. The calyces, pelves and ureters are patent throughout. The urinary bladder is not distended. The wall is of the usual thickness and the mucosal surface is in tat and contains a few cc of clear, straw colored urine.
The uterus, fallopian tube and ovaries are unremarkable.
HEAD:
The scalp is incised and reflected and the calvarium opened in the usual routine manner. No evidence of recent or remote fracture is noted and the leptomeninges are intact. The brain weighs 530 grams (normal weight 403 +/- 60 grams). Sectioning through the cerebral hemisphere, cerebellum, pons and brain stem shows marked congestion of the meningeal vessels. No hemorrhage is identified. The ventricular system is intact. The Circle of Willis is normal and symmetrically formed and the component portions are intact.
SG/rmd

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF TRENTON

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street
P.O. Box 896
Red Bank, New Jersey 07701
(908) 741-2525
HJC/5217
Attorneys for Plaintiff

FILED
May 15, 1995
At 8:30 _____ M
William T. Walsh
Clerk

ENTERED
on
THE DOCKET
on 5-18-95
WILLIAM T. WALSH, CLERK
BY: lw
Deputy Clerk

KAREN F. ALEXANDER, et al.,	HONORABLE MARY LITTLE PARELL
	Civil Action No. 94-5229
Plaintiff(s)	CONSENT ORDER OF JUDGMENT
CHRISTINE TODD WHITMAN, et al.	
Defendant(s).	

THIS MATTER, having been brought before the Court upon the joint application of the class action Plaintiffs and the Defendant Janice S. Mathis in her capacity as the Surrogate of Atlantic

County, and the consent of the attorneys for the respective parties noted below, and good cause having been shown;

IT IS on this 12th day of May, 1995;

ORDERED that the Defendant Janice S. Mathis shall not file any further submissions in this case opposing the factual and legal contentions of the Plaintiffs;

IT IS FURTHER ORDERED that the Defendant Janice S. Mathis shall be bound by all future interlocutory and final orders of this Court with respect to the legal issues raised including those concerning the constitutionality of new Jersey's wrongful death and survival action statutes and shall follow and obey the rulings of this Court including the issuance of letters of general administration and letters of administration ad prosequendum relating to the death of infants stillborn in full compliance with the judgment and holdings of this Court;

IT IS FURTHER ORDERED that the Defendant Janice S. Mathis withdraws all opposition to this matter proceeding as a class action and consents thereto if the Court deems certification of this matter as a class action appropriate;

IT IS FURTHER ORDERED that the Plaintiffs' claim for attorney's fees against the Defendant Janice S. Mathis, be and is hereby deemed withdrawn and such claim is dismissed against the Defendant Janice S. Mathis, and no counsel fees or costs shall be awarded against or in favor of Defendant Janice S. Mathis;

IT IS FURTHER ORDERED that the Plaintiffs shall be relieved of any obligation to serve papers upon Defendant Janice S. Mathis during the balance of this case except the Plaintiffs must supply Defendant Janice S. Mathis with copies of any and all orders or judgments which affect the rights or obligations of Defendant Janice S. Mathis;

IT IS FURTHER ORDERED that a true copy of this Order shall be served upon all parties within 10 days.

I consent to the entry of the within Order in form and substance:

Harold J. Cassidy, Esq.
Counsel for Plaintiffs

I consent to the entry of the within Order in form and substance:

William P. Busch, Esq.
Counsel for Defendant
Janice S. Mathis

Mary Little Parell
U.S. District Judge

RECEIVED
WILLIAM T. WALSH, CLERK
June 15, 11 42 AM '95

FILED
June 15, 1995
At: 8:30 _____M
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KAREN F. ALEXANDER, et al.,	HONORABLE MARY LITTLE PARELL
	Civil Action No. 94-5229
Plaintiff(s)	
	NOTICE OF APPEAL
CHRISTINE TODD WHITMAN, et al.	
Defendant(s).	

Notice is hereby given that Karen Alexander, individually and on behalf of all persons similarly situated; Dennis Drazin, Esq., individually and on behalf of all attorneys similarly situated; and Drazin & Warshaw, a professional corporation, individually and on behalf of all firms similarly situated, Plaitniffs above named, hereby appeal to the United States Court of Appeals for the Third Circuit from a final judgment entered in this action on May 18, 1995. Plaintiffs appeal only from those parts of the Judgment dismissing Counts I, II, III and IV.

Dated: June 13, 1995

/s/ Harold J. Cassidy

HAROLD J. CASSIDY (HJC/5217)
Attorney for plaintiffs
Cassidy, Foss & San Filippo
225 Broad Street, P.O. Box 896
Red Bank, NJ 07701-0896

RECEIVED
WILLIAM T. WALSH
June 27 12:00 PM '95

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KAREN F. ALEXANDER, et al.,	HONORABLE MARY LITTLE PARELL
	Civil Action No. 94-5229
Plaintiff(s)	AMENDED NOTICE OF APPEAL
CHRISTINE TODD WHITMAN, et al.	
Defendant(s).	

Notice is hereby given that Karen Alexander, individually and on behalf of all persons similarly situated; Dennis Drazin, Esq., individually and on behalf of all attorneys similarly situated; and Drazin & Warshaw, a professional corporation, individually and on behalf of all firms similarly situated, Plaitniffs above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the entire final judgment entered in this action on May 18, 1995. Plaintiffs appeal from all of the issues and all of the judgment as it relates to dismissal and denial of plaintiffs motions for summary judgment except as it relates to Count Five of the Complaint.

Dated: June 26, 1995

/s/ Harold J. Cassidy

HAROLD J. CASSIDY (HJC/5217)
Attorney for plaintiffs
Cassidy, Foss & San Filippo
225 Broad Street, P.O. Box 896
Red Bank, NJ 07701-0896

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street
P.O. Box 896
Red Bank, New Jersey 07701
(908) 741-2525
Attorneys for Plaintiff

KAREN F. ALEXANDER, individually, KAREN F. ALEXANDER, AS Administratrix ad Prosequendum of the Estate of Baby Girl Alexander; KAREN F. ALEXANDER, General Administratrix of the Estate of Baby Girl Alexander	SUPERIOR COURT OF NEW MONMOUTH COUNTY LAW DIVISION
Plaintiff(s),	DOCKET NO. L-3896-94
v.	**Civil Action**
ILHAM ALQAISI, M.D.; et al.,	**CONSENT ORDER GRANTING DEFENDANTS PARTIAL SUMMARY JUDGMENT DISMISSING THE COUNTS ALLEGING THE CAUSE OF ACTION FOR THE EMOTIONAL DISTRESS (*PORTEE* CLAIM) OF KAREN ALEXANDER**
Defendant(s).	

THIS MATTER having come before the Court made by motion filed on behalf of defendants, Jersey Shore Medical Center, Barbara Moore, R.N.C., Jacqueline Frederique, L.P.N., Christine W. Gerritsen, R.N., Priscilla Wright, L.P.N., S. Grohowski, R.N.C., Dr. Cheron, M.D., and Dr. Joseph Canterino, M.D. by their attorneys, Amdur, Boyle & Maggs, P.C., which is joined by the other defendants, and the defendants seeking an Order for partial summary judgment to dismiss the emotional distress cause of action filed on behalf of the plaintiff, Karen Alexander, in her

individual capacity, the defendants contending that the plaintiff does not establish the factual requirements necessary to establish severity of emotional distress necessary to establish a prima facie case and with good cause having been shown, and with the consent of all parties noted below,

IT IS ON THIS 3rd day of June , 1997,

ORDERED THAT partial summary judgment dismissing the emotional distress claim (*Portee* claim) of Karen Alexander be and is hereby granted and in favor of the defendants Jersey Shore Medical Center, Barbara Moore, R.N.C., Jacqueline Frederique, L.P.N., Christine W. Gerritsen, R.N., Priscilla Wright, L.P.N., S. Grohowski, R.N.C., Dr. Cheron, M.D., and Dr. Joseph Canterino, M.D., and Charles Hux, M.D. and it is

FURTHER ORDERED that a copy of this Order shall be served upon Defendants within days of the date hereof.

/s/ Florence R. Peskoe, J.S.C.
Florence R. Peskoe, J.S.C.

We consent to the above Order in form and substance:

/s/ Harold J. Cassidy, Esq.
Harold J. Cassidy, Esq.
on behalf of the plaintiff, Karen F. Alexander, individually.

/s/ Robert A. Gionnone
Robert A. Giannone, Esq.
on behalf of defendant, Charles Hux, M.D.

/s/ Richard A. Amdur, Esq.
Richard A. Amdur, Esq.
Amdur, Boyle & Maggs
on behalf of the defendants, Jersey Shore Medical Center, Barbara L. Moore, R.N.C., Jacqueline Frederique, L.P.N., Christine W. Gerritsen, R.N., Priscilla Wright, L.P.N., S.Grohowski, R.N.C., Dr. Cheron, M.D. and Joseph Canterino, M.D.

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street
P.O. Box 896
Red Bank, New Jersey 07701
(908) 741-2525
Attorneys for Plaintiff

KAREN F. ALEXANDER, individually, KAREN F. ALEXANDER, AS Administratrix ad Prosequendum of the Estate of Baby Girl Alexander; KAREN F. ALEXANDER, General Administratrix of the Estate of Baby Girl Alexander	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY
Plaintiff(s),	:	DOCKET NO. L-3896-94
v.	:	**Civil Action**
ILHAM ALQAISI, M.D.; et al., Defendant(s).	:	**CONSENT ORDER GRANTING DEFENDANTS ILHAM ALQAISI, M.D. PARTIAL SUMMARY JUDGMENT DISMISSING THE COUNTS ALLEGING THE CAUSE OF ACTION FOR THE EMOTIONAL DISTRESS (*PORTEE* CLAIM) OF KAREN ALEXANDER**

THIS MATTER having come before the Court made by motion filed on behalf of defendants, Jersey Shore Medical Center, Barbara Moore, R.N.C., Jacqueline Frederique, L.P.N., Christine W. Gerritsen, R.N., Priscilla Wright, L.P.N., S. Grohowski, R.N.C., Dr. Cheron, M.D., and Dr. Joseph Canterino, M.D. by their attorneys, Amdur, Boyle & Maggs, P.C., which is joined by the other defendants, including Dr. Alqaisi, and the defendants seeking an Order for partial summary judgment to dismiss the emotional distress cause of action filed on behalf of the plaintiff, Karen

Alexander, in her individual capacity, the defendants contending that the plaintiff does not establish the factual requirements necessary to establish severity of emotional distress necessary to establish a prima facie case and with good cause having been shown, and with the consent of all parties noted below,

IT IS ON THIS 5th day of June , 1997,

ORDERED THAT partial summary judgment dismissing the emotional distress claim (*Portee* claim) of Karen Alexander be and is hereby granted and in favor of the defendants Jersey Shore Medical Center, Barbara Moore, R.N.C., Jacqueline Frederique, L.P.N., Christine W. Gerritsen, R.N., Priscilla Wright, L.P.N., S. Grohowski, R.N.C., Dr. Cheron, M.D., and Dr. Joseph Canterino, M.D., and Charles Hux, M.D. and it is

FURTHER ORDERED that a copy of this Order shall be served upon Defendants within days of the date hereof.

/s/ Florence R. Peskoe, J.S.C.
Florence R. Peskoe, J.S.C.

We consent to the above Order in form and substance:

/s/ Harold J. Cassidy, Esq.
Harold J. Cassidy, Esq.
on behalf of the plaintiff, Karen F. Alexander, individually.

/s/ John Orlovsky, Esq.
John R. Orlovsky, Esq.
on behalf of the defendant, Ilham Alqaisi, M.D.

Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

(3)

No. 97-322

In The

Supreme Court of the United States

October Term, 1996

KAREN F. ALEXANDER,

Petitioner,

v.

CHRISTINE TODD WHITMAN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

PETER VERNIERO
Attorney General of New Jersey
Attorney for Respondents Christine Todd Whitman and Peter Verniero
RICHARD J. HUGHES JUSTICE COMPLEX
P.O. Box 112
Trenton, New Jersey 08625
(973) 648-4730

ANDREA M. SILKOWITZ
Assistant Attorney General
Of Counsel and On the Brief
(*Counsel of Record*)

PATRICIA A. SCHIRIPO
Deputy Attorney General
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly concluded that the challenge to the classifications set forth in the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 *et seq.*, and the New Jersey Survival statute, N.J.S.A. 2A:15-3, – denying a derivative cause of action on behalf of stillborn fetuses – failed to state a claim under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution?

2. Whether the Court below correctly dismissed the complaint insofar as it asserted the existence of constitutional rights of a stillborn fetus under the Fourteenth Amendment to the United States Constitution?

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COUNTERSTATEMENT OF THE CASE

On July 15, 1992, petitioner Karen F. Alexander delivered an eight and one-half month old stillborn fetus. (App. 57).[1] In July 1994, Alexander sought to commence in the Superior Court of New Jersey wrongful death and survival actions on behalf of the fetus' estate, alleging that the treating physicians and others had been negligent so as to cause the death of the fetus (App. 51, 57). On or about October 18 and 31, 1994, the Monmouth County Surrogate denied Alexander's request to issue Letters of Administration Ad Prosequendum on the grounds that the fetus was stillborn (App. 57).

On or about October 28, 1994, Alexander, Dennis Drazin, a New Jersey attorney, and Drazin & Warshaw, a professional corporation, filed a class action complaint in the United States District Court for the District of New Jersey naming as defendants Christine Todd Whitman, individually and in her official capacity as the Governor of New Jersey, Deborah T. Poritz, individually and in her official capacity as the Attorney General of New Jersey, and the surrogates of all twenty-one New Jersey counties (App. 49 to 74). Alexander alleged violations of her rights as well as those of the unborn fetus under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution in that the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 *et seq.*, and the New Jersey Survival statute, N.J.S.A. 2A:15-3, as

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[1] App. ___ refers to the appendix to the petition for writ of certiorari.

interpreted by the Supreme Court of New Jersey in *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988), excluded rights of recovery on behalf of a stillborn fetus (App. 58 to 59; App. 63).[2]

On December 11, 1995, the State defendants filed a motion pursuant to Fed. R. Civ. P. 12(b)(6) to have the complaint dismissed with prejudice for failure to state a claim for which relief could be granted (App. 6). The county surrogate defendants thereafter moved to join in the State defendants' motion to dismiss with Alexander cross-moving for class certification and for summary judgment (*Ibid.*).

Following argument on March 6, 1995, the Honorable Mary Little Parell, United States District Judge, issued a memorandum opinion and order granting the State defendants' motion to dismiss (App. 35 to 48). The District Court further dismissed the motion for class certification and denied plaintiffs' motion for summary judgment (App. 48).

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[2] Drazin and Drazin and Warshaw, P.C., raised identical constitutional challenges on behalf of clients seeking to bring wrongful death and survival actions in the New Jersey courts for the death of stillborn fetuses. (App. 67, 70). Because of those alleged constitutional deprivations, Drazin asserted that he and other similarly situated attorneys had "lost fees in their representation of their clients." (App. 68). He did not allege however that his or any other attorney's constitutional rights had been violated by operation of the challenged statutes. The District Court ultimately concluded (App. 39 to 42) and the Court of Appeals concurred (App. 28 to 29) that Drazin and the law firm lacked standing to assert the constitutional rights of their clients. No petition for certiorari has been filed for review of this ruling.

In so ruling Judge Parell determined that the New Jersey Legislature's decision to exclude unborn or stillborn fetuses from the definition of "persons" covered by the Wrongful Death Act and from the purview of the survival action statute did not impinge upon any "fundamental" familial or parental decisional interest but rather solely impacted on a parent's right to maintain a statutorily created cause of action based on tort (App. 44 to 45 n.9). As such, the District Court concluded that the statutes were subject to review under the rational basis standard of *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972), not the strict scrutiny analysis urged by Alexander. Applying the more deferential standard of review, the District Court determined that the New Jersey Legislature's limitation of the tort action bore a "rational relationship to the legitimate legislative goal of placing reasonable limits on wrongful death and survival actions in the State of New Jersey." (App. 47). Insofar as Alexander asserted violation of her unborn fetus's constitutional rights, the Court rejected the claim on the basis of the holding in *Roe v. Wade*, 410 U.S. 113, 158 (1973) that the word "person" as used in the Fourteenth Amendment did not "include the unborn." (App. 38 n.3).

On appeal the United States Court of Appeals affirmed, finding that this Court's rulings in *Roe v. Wade, supra,* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) – that unborn fetuses are not persons within the meaning of the Fourteenth Amendment – precluded any claim asserting an equal protection violation on behalf of Alexander's stillborn fetus (App. 12). As for Alexander's claim that the statutory exclusion impinged upon her fundamental interest

in a relationship with the unborn fetus, the Court found, without determining whether the pre-natal relationship was a "fundamental interest," that this relationship was not affected, only " . . . the ability to recover for the loss of that relationship." (App. 19). Moreover, although New Jersey law prevented Alexander from instituting certain kinds of lawsuits, she was ". . . not being denied the protection of the State's tort law" as she had a common law remedy under *Giardina v. Bennett, supra,* to recover for emotional distress and any injury resulting from medical malpractice leading to the stillbirth. (App. 20).

Having found that the New Jersey tort scheme did not impinge upon any relationship Alexander had had with her stillborn fetus, the Court of Appeals evaluated the substantive due process claim under the rational basis analysis adopted in *Vance v. Bradley,* 440 U.S. 93 (1979) and found the line the State had drawn in limiting tort recovery to be legitimate (App. 24 to 25). Under a similar analysis the Court of Appeals rejected the equal protection challenge (App. 25 to 28).[3]

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[3] The brief concurring opinion of Judge Alito reported at 114 F.3d 1392, 1409 (3d Cir. 1997) has not been reproduced in the appendix to the petition for writ of certiorari. Judge Alito wrote:

> I am in almost complete agreement with the court's opinion, but I write to comment briefly on two points. First, I think that the court's suggestion that there could be "human beings" who are not "constitutional persons" (Maj.Op. 1401-02) is unfortunate. I agree with the essential point that the court is making: that the Supreme Court has held that a fetus is not a "person" within the meaning of the Fourteenth Amendment. However, the reference to constitutional non-persons, taken out of context, is capable of

This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS PROPERLY REJECTED THE WITHIN CHALLENGE TO THE CONSTITUTIONALITY OF N.J.S.A. 2A:31-1 *ET SEQ.* AND N.J.S.A. 2A:15-3 UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

By this action petitioner urges that the New Jersey Wrongful Death Act and its component survival actions, as interpreted by the Supreme Court of New Jersey in *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988), violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution by denying recovery to the parents of a stillborn fetus whose death results from the negligence of third parties. As the Court of Appeals correctly concluded, the distinctions drawn by the New Jersey Legislature are reasonable and do not impinge upon any protectable constitutional rights of either the unborn or the parents of the stillborn fetus.

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misuse. Second, I think that our substantive due process inquiry must be informed by history. It is therefore significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized. *See Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139, 143 (N.J. 1988); *Smith v. Brennan*, 157 A.2d 497, 498 (N.J. 1960).

The New Jersey Wrongful Death statute in pertinent part states:

> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.
>
> [N.J.S.A. 2A:31-1]

The purpose of the statute is to compensate those persons entitled to take intestate for "pecuniary injuries" resulting from the death of the "person . . . caused by a wrongful act, neglect or default . . . " N.J.S.A. 2A:21-1,-4 and -5; *see also Alfone v. Sarno*, 168 N.J. Super. 315, 321, 403 A.2d 9, 12 (App. Div.), *modified on other grounds*, 87 N.J. 99, 432 A.2d 857 (1979). ("The fundamental aim of our act is compensation for pecuniary losses suffered by the survivors of those killed by wrongful acts.") As such, the statute does not provide for punitive damages. *Hudgins v. Serrano*, 186 N.J. Super., 465, 476, 453 A.2d 218, 224 (App. Div. 1982). ("[A]n award in [a wrongful death action] . . . is not a matter of punishment for an errant defendant . . . but is rather a replacement for that which decedent would likely have provided and no more.") Nor does the statute allow for compensation for the emotional loss of or pleasure derived from companionship with the deceased. Rather, the statute limits compensatory damages to the economical value of the deceased's services,

viz., the pecuniary value of help with household chores, anticipated financial contributions, and the pecuniary value of the deceased's companionship, including advice and guidance. *Green v. Bittner*, 85 N.J. 1, 4, 12-14, 424 A.2d 210, 213, 215-216; *Carey v. Lovett*, 132 N.J. 44, 67-68, 622 A.2d 1279, 1291 (1993).

In addition to the compensatory damages provided by the Wrongful Death Act the survival action, found at N.J.S.A. 2A:15-3, allows for the recovery of funeral and burial expenses and "damages accrued during the lifetime of the deceased" by the executor of the estate or the administrator, if the person died intestate. While the Supreme Court of New Jersey in *Giardiana v. Bennett, supra* (as it had 24 years earlier in *Graf v. Taggert*, 43 N.J. 303, 204 A.2d 140 (1964)) concluded that the Legislature in enacting the Wrongful Death Act did not intend to include a fetus "as a being whose death can give rise to a claim for pecuniary loss by next-of-kin . . . ", 111 N.J. at 428, 545 A.2d at 147, the Court did recognize "that the medical malpractice causing an infant stillbirth constitutes a tort against the parents, entailing the direct infliction of injury, their emotional distress and mental suffering, for which they are entitled to recover compensatory damages." *Id.* at 413, 545 A.2d at 139. Under these circumstances the Court opined that recognition of entitlement to compensatory damages for parental emotional distress and mental suffering as a "direct and foreseeable impact on the family as a unit," *id.* at 18, 545 A.2d at 142, provided adequate protection for the "interests that are implicated in wrongful fetal death [and] [t]herefore, there is no need to modify th[e] [Wrongful Death] Act in order to effectuate its purpose." *Id.* at 428-429, 545 A.2d at 147.

The petitioner alleges however that her substantive due process rights as well as those of her stillborn fetus have been violated in that the subject New Jersey statutes impinge on a "protectable interest in her relationship" with her unborn child and that "enjoyment of [the relationship] [is] a fundamental constitutional right under the United States Constitution." (App. 58). Alexander further asserts a denial of her constitutional right to equal protection as well as her deceased fetus' right to equal protection by reason of the statutory grant of a cause of action to children and to mothers on behalf of their children's estates where the children were injured *in utero* by the tortious acts of third parties and are later born alive but denial of the cause of action to mothers of fetuses similarly injured *in utero* but stillborn. However, as the Court of Appeals concluded, she has failed to assert a legally viable claim on any of the grounds asserted.

A. A "Person" Under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 Does Not Include an Unborn or Stillborn Fetus.

To the extent that petitioner alleges a violation of her unborn child's Fourteenth Amendment rights, she ignores this Court's rulings as to the meaning of the word "person" in the Fourteenth Amendment. Thus, in 1973 the Court rejected the argument advanced by the State of Texas and *amici curiae* that an unborn fetus was a "person" within the language and meaning of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. 113, 156, 159 (1973). The Court stated clearly that "the word 'person' as used in the Fourteenth Amendment does not include the

unborn." 410 U.S. at 158. Notably, neither the dissenting opinion of then Justice Rehnquist in *Roe* nor the opinions of any of the Justices in the Court's most recent reexamination of the underpinnings of the *Roe* ruling have questioned the correctness of the earlier ruling. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). See in particular, the opinion of Justice Stevens, concurring in part, dissenting in part, 505 U.S. at 913-914.

> The *Court in Roe carefully considered, and rejected the State's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."* 410 U.S., at 156. After analyzing the usage of "person" in the Constitution, the *Court concluded that the word "has application only postnatally." Id.* at 157. Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: "Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense." *Id.* at 162. Accordingly, an abortion is not "the termination of life entitled to Fourteenth Amendment protection." *Id.* at 159. *From this holding, there was no dissent, see id., at 173; indeed, no member of the Court has ever questioned this fundamental proposition.* Thus, as a *matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life."* This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy. [emphasis added].

Consistent with *Roe's* holding, the Federal courts have similarly rejected the claim that a fetus is a person or citizen for purposes of 42 U.S.C. § 1983. *See McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751, 754 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3d Cir. 1973). *Accord Reed v. Gardner*, 986 F.2d 1122, 1127-28 (7th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 389 (1993); *Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123 (D.P.R. 1988).

Thus, insofar as Alexander asserts the constitutional rights of her unborn child, these claims were properly dismissed as a matter of law pursuant to Fed. R. Civ. P. 12(b)(6).

B. As the Subject New Jersey Statutes Do Not Impinge on any Fundamental Rights Recognized by this Court and are Rationally Related to a Legitimate State Interest in Defining Tort Remedies the Court of Appeals Correctly Upheld the Statutes under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) Justice O'Connor comprehensively reviewed the rights recognized as fundamental by the Court. The Court noted that the "most familiar of the substantive liberties . . . are those recognized by the Bill of Rights." *Id.* at 847. The Court also explained that there is a "realm of personal liberty which the government may not enter," namely, those "personal decisions relating to marriage, procreation, contraception, family

relationships, child rearing, and education." *Casey, supra*, 505 U.S. at 847, 851.[4]

Here, however, as the Court of Appeals recognized, the subject New Jersey statutes purport only to grant a cause of action to the heirs of persons who have been injured by the tortious conduct of third parties. They do not, in any substantive manner, impinge upon any "personal decisions relating to . . . procreation . . . family relationships, [or] child rearing, *Planned Parenthood v. Casey, supra*, 505 U.S. at 851. Indeed, as this Court postulated in *Parham v. Hughes*, 441 U.S. 347, 358 n.12 (1979), "[i]t cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right." Moreover, insofar as the Supreme Court of New Jersey has recognized "that the medical malpractice causing an infant stillbirth constitutes a tort against the parents, *Giardina v. Bennett*,

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[4] Those personal decisions have been addressed by the Court in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942) (procreation); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (whether to bear or beget a child); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (child rearing and education); and *Roe v. Wade, supra*, 410 U.S. at 152-53 (abortion). *Santosky v. Kramer*, 455 U.S. 745 (1982) and *Lassiter v. Dept. Of Soc. Services*, 452 U.S. 18 (1981) do not suggest any broader interpretation of the fundamental interests at stake. Insofar as both cases focused upon due process rights attendant to State actions to terminate parental rights-legal proceedings designed to extinguish the parental decision making role in its entirety – the Court's discussion of the parental liberty interest must be viewed in the context of that very unique setting.

supra, 111 N.J. at 413, 545 A.2d at 139, the State has provided compensation for the injury to "the family as a unit . . . [and] the strong and intimate bonds between the respective parents and their child." 111 N.J. at 418, 545 A.2d at 142. Accordingly, the Court of Appeals correctly rejected petitioner's contention that the challenged legislative classifications should be reviewed under a strict scrutiny analysis and upheld only if: 1) a compelling state interest was proffered and 2) it was established that the State's objective could not be achieved by means less restrictive of the affected fundamental right. *Roe v. Wade*, *supra*, 410 U.S. at 154.

Under the appropriate rational basis review, a statute will withstand substantive due process challenge if the state identifies a legitimate state interest that the legislature rationally could conclude was served by the statute. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83 (1978). In so reviewing the challenged statutes "[t]he law need not be in every respect consistent with its aims to be constitutional," *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955), nor should the Court second guess the legislative branch's factual assumptions or policy choices in enacting the statute. *Id.* at 488.

It is thus the petitioner's burden to demonstrate that "the legislative facts on which the [statutory] classification is apparently based could not reasonably be conceived as true . . . " *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Under this test and the identical standard of review applied to petitioner's equal protection argument, see *Federal Communications Comm. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) and *Massachusetts Board*

of Retirement v. Murgia, 427 U.S. 307, 312 n.3 and 4 (1976), the challenged statutes readily survive scrutiny as a reasonable legislative determination to set limits upon tort recovery for wrongful death.

As this Court has repeatedly recognized, legislation necessarily " 'requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line' " and that an argument that " 'the line might have been drawn differently at some points is a matter for legislative rather than judicial consideration.' " *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, the Court has held that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others," *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). Judicial intervention is therefore unwarranted unless the different groups created are "so unrelated to the achievement of any combination of legitimate purposes" that the legislature's actions must be deemed irrational. *Vance v. Bradley, supra*, 440 U.S. at 97. Thus, the rational basis standard requires only that such persons are classified "in a matter rationally related to legitimate government objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). "The assumptions underlying the[ ] [legislative] rationales may be erroneous, but the very fact that they are 'arguable' is sufficient . . . " to defeat the constitutional challenge. *Vance v. Bradley, supra*, 440 U.S. at 112. *Accord Sullivan v. Stroop*, 496 U.S. 478, 485 (1990) (regulations must be upheld where "any state of facts reasonably may be conceived to justify it"). Indeed, rational basis review begins with a "presumption of validity against attack under the

Equal Protection Clause." *Parham v. Hughes, supra,* 441 U.S. at 351.

The legislative bases for the New Jersey Wrongful Death Act and the component survival action were commented upon by the Supreme Court of New Jersey in *Giardina, supra.* Because the language of the New Jersey Wrongful Death Act refers to the wrongful death of a "person," the Supreme Court reasoned that the New Jersey Legislature at the time of enactment adopted the common law concept of a person, which did not include a fetus. 111 N.J. at 421, 545 A.2d at 143. As the Court pointed out, that determination was supported by the Legislature's response when addressing the status of the unborn child in other settings. For example, the New Jersey Legislature has not relied on a "broad definition of 'person' " in other contexts, but rather has explicitly stated that a child *in esse* is included in the definition of children under the Workers' Compensation Act, N.J.S.A. 34:15-13(f), and a stillborn infant or fetus is included in the definition of decedent under the Uniform Anatomical Gift Act, N.J.S.A. 26:6-57(b). *Id.* Also, under the New Jersey Criminal Code, the "Legislature considered and rejected the opportunity to classify a fetus as a 'person.' " 111 N.J. at 422, 545 A.2d at 144.

The *Giardina* Court thus concluded that the Legislature's "intention [was] to provide a limited right of recovery in the face of the common-law bar against such actions." 111 N.J. at 424, 545 A.2d at 145. This objective was, in the Court's view, confirmed by the failure of the Legislature to take any action to amend the statute to reverse the earlier Supreme Court ruling in *Graf v. Taggart, supra,* declining to find a right of recovery for the

wrongful death of an unborn child under the Wrongful Death Act. *See Giardina, supra,* 111 N.J. at 425-426, 545 A.2d at 146.

In reaching its conclusion, the *Giardina* Court relied on *Justus v. Atchinson,* 565 P.2d 122 (Cal. 1977), a case in which the California Supreme Court addressed the issue of whether a fetus was a person for purposes of the wrongful death statute in effect in that State at the time. If the Court found that the California wrongful death statute did not provide a cause of action, then, as an alternative argument, the plaintiffs there claimed that the statute denied parents the equal protection of the laws. 565 P.2d at 133. After concluding that the statute did not provide a cause of action to the fetus, the Court reached the alternate argument. Although the California Supreme Court empathized with the parents, it found that "the distinction drawn by the statute between born and unborn children is not arbitrary, but bears a rational relationship to the legislative goal of placing reasonable limits on wrongful death actions in this state." *Ibid.*

So too here, as the *Giardina* Court found, in creating a statutory cause of action unknown at common law, the Legislature found it prudent to limit the class of intended beneficiaries by following the common law definition of person, a definition which did not include a fetus. That purpose was legitimate at the time of enactment and it remains legitimate today. *Cf. Duke Power Co. v. Carolina Envtl. Study Group, supra,* 438 U.S. at 82-84, 93-94 (where Court rejected substantive due process and equal protection challenge to ceiling on aggregate liability for nuclear accidents finding that ceiling was closely related to statute's purpose of avoiding excessive liability). Moreover,

while the present Supreme Court of New Jersey may have concluded that the damages that would occur "if fetal death qualified as an actionable wrongful death under the Act are not too speculative," *Giardina v. Bennett, supra,* 111 N.J. at 427, 545 A.2d at 147, the New Jersey Legislature may in fact share the contrary view of the members of the Court sitting in 1964 that the "anticipated evidence on the issue of damages for loss of pecuniary benefit in prenatal death cases is uniformily speculative." *Graf v. Taggert, supra,* 43 N.J. at 311, 204 A.2d at 145.

At bottom, however, petitioner's claim is nothing more than an argument that the Legislature's "line-drawing" could have been more inclusive. But statutes need not draw distinctions with "mathematical exactitude," *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976), even where the classification results in some inequality. *McGowan v. Maryland, supra,* 366 U.S. at 425-26; *Silver v. Silver,* 280 U.S. 117, 123-124 (1929) (Court rejects equal protection challenge to state statute denying tort recovery for negligence to persons carried gratuitously as a guest in an automobile; " . . . there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied – that the legislature must be held rigidly to the choice of regulating all or none.")

Moreover, as the Court of Appeals explained, this Court's decisions in *Levy v. Louisiana,* 391 U.S. 68 (1968), *Glona v. American Guarantee & Liab. Ins. Co.,* 391 U.S. 73 (1968) and *Weber v. Aetna Casualty & Sur. Co.,* 406 U.S. 164 (1972), relied so heavily upon by petitioner, do not undercut this conclusion and are "simply not relevant to the issues raised . . . " (App. 22 n.16).

First, in *Levy*, Louisiana's wrongful death and survival action statutes were being challenged on behalf of five illegitimate children for the wrongful death of their mother. The Louisiana statutes denied a wrongful death and survival cause of action to illegitimate children while granting a cause of action to legitimate children.

The *Levy* Court began its discussion with the undisputed legal premise that illegitimate children are "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 439. From that premise, the Court struck down the statute because the State's purpose – to discourage illegitimacy – was not a rational basis for denying tort recovery to illegitimate children. *See also Glona v. American Guarantee, supra,* 391 U.S. at 75. Thus, the Court held that illegitimate children should not be foreclosed from tort compensation because of the illicit behavior of their biological parents.

Similarly, in the companion case of *Glona v. American Guarantee,* a mother sued for the wrongful death of her illegitimate son who was killed in an automobile accident in Louisiana. The Court determined again that Louisiana's asserted basis in denying recovery – to discourage illegitimacy – was not a rational basis to deny the mother's wrongful death cause of action.

Weber v. Aetna, supra, is to the same effect. There the Court addressed a statutory scheme whereby illegitimate children were denied the right to recover under Louisiana's workers' compensation laws for the death of their father. The subject law allowed legitimate and acknowledged illegitimate children to recover on an equal basis; however unacknowledged illegitimate children could

only recover if there were not enough surviving dependents in other categories to exhaust the benefits. 406 U.S. at 168.

The *Weber* Court, relying on the *Levy* decision, found that the workers' compensation law effected a denial of equal protection. The *Weber* Court characterized *Levy* as holding that the fact of a child's birth out of wedlock poses no reasonable relationship to the purpose of the wrongful-death statutes which compensate children for the death of a mother. 406 U.S. at 168. The determinative factor, as in *Levy*, was the inability of both the father and the child to change the burden imposed by illegitimacy.[5]

There are two important factors which distinguish *Levy*, *Glona* and *Weber* from the facts of this case. First, all of those cases dealt with illegitimate children who, unlike the unborn or stillborn, *are* persons under the Fourteenth Amendment. Second, those persons – illegitimate children – were being denied benefits solely on the basis of their parents' conduct. Here, in contrast, the New Jersey tort scheme provides a remedy for both legitimate and illegitimate children and their parents; the statutory exclusion applies only to fetuses because unborn children are not legally persons.

Furthermore, the cases do not support the assertion of a fundamental right of tort recovery. *See Weber*, 406 U.S. at 183 (Rehnquist, J., dissenting). ("In spite of the Court's statement of a test, one part of which requires the

---

[5] The deceased father was unable to marry the illegitimate children's mother because his first wife was still alive and confined to a mental institution. *Weber*, 406 U.S. at 171 n.9.

determination of the extent to which 'fundamental personal rights' might be endangered by the Louisiana classification here, we are nowhere told in the opinion just what 'fundamental personal right' [ ] is involved.") *See also Duke Power, supra,* 438 U.S. at 88 n.32. Nor do these cases establish that the State must show a compelling interest in order for its statutory scheme to be upheld. In fact, in *Glona,* the Court found no *rational basis* for the statute. 391 U.S. at 75.

Certainly, then, because the New Jersey Legislature had a rational basis for not including a stillborn fetus in the class of persons encompassed by the challenged Acts, this Court should find that the statutes are constitutional and leave any further consideration of a revamping of the tort scheme to the New Jersey Legislature.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

PETER VERNIERO
Attorney General of New Jersey
Attorney for Respondents

By: ANDREA M. SILKOWITZ
Assistant Attorney General

Dated: September 19, 1997

Supreme Court, U.S.
FILED
SEP 22 1997
CLERK

No. 97-322

In The

Supreme Court of the United States

October Term, 1996

KAREN F. ALEXANDER,

Petitioner,

v.

CHRISTINE TODD WHITMAN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT ELTON A. CONDA SURROGATE OF BURLINGTON COUNTY

EVAN H.C. CROOK
Solicitor, Burlington County

JEAN HARTMAN CULP*
Assistant Solicitor
Burlington County
49 Rancocas Road
Room 225
Mount Holly, New Jersey 08065
609-265-5555

Attorney For Respondent

**Counsel of Record*

PARTY TO THE PROCEEDINGS

This Opposition to the Petition for Writ of Certiorari is submitted by Elton A. Conda, Surrogate of Burlington, one of the twenty-one county surrogates named in the complaint filed by the Petitioner in the United States District Court.

The Surrogate of Burlington County is an official of the State of New Jersey elected by the people of Burlington County pursuant to art. VII, § 2, ¶ 2 of the New Jersey Constitution.

The Surrogate is bound by and must follow the laws of the State of New Jersey. In accordance with the New Jersey Wrongful Death Act, *N.J.S.A.* 2A:32-1 *et seq.* (1987), the Surrogate issues letters of administration *ad prosequendum*. In accordance with the New Jersey Survival Statute, *N.J.S.A.* 2A:15-3 (1987), the Surrogate issues letters of general administration.

The Surrogate is also bound by the holding of the Supreme Court of New Jersey in *Guardina v. Bennett*, 545 *A*.2d 139 (1988) in which the court held that the New Jersey Wrongful Death Act does not provide a cause of action for parents of an unborn or stillborn fetus. *Id.* at 147. Although not specifically addressed in *Guardina*, both courts below have held that the statutory right to bring an action under either the Wrongful Death Act or the Survival Statute is not to be issued in situations in which a fetus fails to survive until after birth. Pa-11; Pa-44, -45.

Thus, by law, the Surrogate may not issue letters of administration *ad prosequendum* or letters of general

administration to parents or other survivors of an unborn or stillborn fetus.

The Burlington County Surrogate, although named as a defendant by Petitioner in this lawsuit, was not the surrogate to whom Petitioner applied for the letters of administration.

ARGUMENT

The Burlington County Surrogate relies on the Brief in Opposition to the Petition for Writ of Certiorari submitted to this Court by the New Jersey Attorney General on behalf of Governor Christine Todd Whitman and Attorney General Deborah T. Poritz.

CONCLUSION

Respondent Elton A. Conda, Surrogate of Burlington County, New Jersey, respectfully requests this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed by Petitioner Karen F. Alexander.

Respectfully submitted,

EVAN H.C. CROOK
Solicitor, Burlington County
Attorney for Respondent
Burlington County Surrogate

BY: JEAN HARTMAN CULP*
Burlington County
Assistant Solicitor

**Counsel of Record*

Supreme Court, U.S.
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(5)

No. 97-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KAREN F. ALEXANDER
Petitioner,

- against -

CHRISTINE TODD WHITMAN; et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF AMICUS CURIAE OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA - NEW JERSEY IN SUPPORT OF THE PETITIONERS' PETITION FOR WRIT OF CERTIORARI

Paul E. Newell, Esq.
Counsel of Record
Attorney for Amicus Curiae
Association of Trial
Lawyers of America - NJ
22 Center Street
Freehold, NJ 07728
(908) 431-7575

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INTEREST OF AMICUS

This Amicus Brief is submitted by the Association of Trial Lawyers of America - New Jersey by consent of the parties: ATLA-NJ submitted an Amici Brief below in the U.S. Court of Appeals for the Third Circuit.

"The Association of Trial Lawyers of America - New Jersey" (ATLA-NJ) maintains its principal office at 150 West State Street in Trenton, New Jersey. ATLA-NJ is affiliated with, and is a branch of, the national organization of the "Association of Trial Lawyers of America", founded in 1946, which has its principal office in Washington, D.C. ATLA-NJ has 2,400 attorneys as members. ATLA has 60,000 members nationwide.

ATLA-NJ provides comprehensive continuing legal education and litigation technique seminars for all members of the New Jersey Bar. As part of its purpose ATLA-NJ promulgates changes and trends in the law and advocates on behalf of its members and their clients. The substantive rights of the clients of its members are of significant importance to ATLA-NJ and its role in advocating the rights of these clients. Legal issues and cases before the Courts, which impact on those rights are of important concern to the organization and its members. This particular case presents important questions of law which impacts on the practice of its members and the rights of the clients of the members.[1]

SUMMARY OF ARGUMENT

As it relates to the Equal Protection Rights of Karen Alexander, a mother whose baby daughter was tortiously killed by a negligent third party, the opinion of the United States Court of Appeals directly conflicts with the decisions of this Court in such a manner that it effectively overrules the decisions of this Court.

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[1]The submission of this Amicus Curiae Brief on behalf of ATLA-NJ is made upon a unanimous vote of its Board of Directors. Pursuant to Rule 37.6. Counsel for ATLA-NJ worked in consultation with counsel for the Petitioners and the counsel for Petitioner assisted in authoring the Brief. Monetary conribution for the cost of printing was made by Damon Keeley, a resident of New Jersey who is not a member of ATLA-NJ.

Among its fundamental errors the Court of Appeals' decision conflicts with the decision of this Court in four ways: 1] it expressly stated that the similarity of circumstances of those who enjoyed the benefits of New Jersey's wrongful death statute and those who do not is irrelevant for purposes of Equal Protection analysis - an erroneous statement that contradicts the clearly articulated law of this Court; 2] in direct defiance of this Court's decision in *Glona v. American Guaranty Liability and Insurance Co.*, 391 U.S. 73, 75, 76 (1968), the Court of Appeals held that the creation of a legal class of persons created by the statute is the controlling element when applying the Equal protection Clause, not the factual reality of the people it is designed to protect; 3] the Court of Appeals held, in effect, that a state need not have any interest advanced by the classification as it relates to the purpose of the law, a holding in conflict with this Court's controlling decisions; and 4] the Court of Appeals ignored the decisions of this Court, including *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) which holds that in instances where a state creates a cause of action which is designed to protect the fundamental interests of individuals within its territory, a classification excluding some persons from that protection must be subjected to strict scrutiny. Certiorari should be granted.

ARGUMENT

POINT I: THE OPINION OF THE UNITED STATES COURT OF APPEALS IN THIS CASE, AS IT RELATES TO THE EQUAL PROTECTION RIGHTS OF KAREN ALEXANDER, SO CONFLICTS WITH THE CONTROLLING DECISIONS OF THIS COURT, AND SO IGNORES SOME OF THE MOST BASIC TENETS OF EQUAL PROTECTION JURISPRUDENCE, THUS EFFECTIVELY OVERRULING THE DECISIONS OF THIS COURT, THAT IT COMPELS A GRANT OF CERTIORARI

The Opinion of the United States Court of Appeals, reported at 14 F.3d 1392, as is relates to Mrs. Alexander's personal equal protection rights, directly conflicts with the decisions of this Court in such a manner that it not only leaves the people of the State of New Jersey with laws which violate the Equal Protection Rights of a segment of its population - an equal protection violation shared with nine other states - but effectively overrules the decisions of this Court. If left without review by this Court it is capable of substantially misleading the bench and bar on important constitutional issues.

The Court of Appeals committed glaring errors, in conflict with the decisions of this Court, in four separate areas of Equal Protection analysis: 1] it expressly stated that the similarity of circumstances of those who enjoyed the benefits of New Jersey's wrongful death statute and those who do not is irrelevant for purposes of Equal Protection analysis - an erroneous statement that contradicts the clearly articulated law of this Court; 2] in direct defiance of this Court's decision in *Glona v. American Guaranty Liability and Insurance Co.*, 391 U.S. 73, 75, 76 (1968), the Court of Appeals held that the creation of a legal class of persons covered by the statute is the controlling elements when applying the Equal protection Clause, not the factual reality of the people it is designed to protect; 3] the Court of Appeals held, in effect, that a state need not have any interest advanced by the classification as it relates to the purpose of the law, a holding in conflict with this Court's controlling decisions; and 4] the Court of Appeals ignored the decisions of this Court, including *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) which holds that in instances where a state creates a wrongful death cause of action which is designed to protect the fundamental interests of

individuals within its territory, a classification excluding some persons from that protection must be subjected to strict scrutiny.

A. The Loss Sustained by Karen Alexander and all Members of Her Class is Identical to the Loss Sustained by Those who Enjoy Benefits Under New Jersey's Wrongful Death Statute. The Holding of the Court of Appeals that the Similarity of the Circumstances of the Members of the Two Classes and the Similarity of the Losses with Respect to the Purpose of the Law was Irrelevant for Equal Protection Jurisprudence, was an Error of Such a Fundamental Nature that it Conflicts with Every Case that this Court has Decided on the Issue.

It has been well established for over seven decades that even where it is appropriate to apply the traditional standard of scrutiny to a state classification that "the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike". *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). See also *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 572 (1910).

In the context of scrutinization of classifications contained within a wrongful death statute this Court, in *Weber v. Aetna*, 406 U.S. 164, 175 (1972), made it clear that the classification had to bear some relationship, to the recognized purposes of the wrongful death statute, which is intended to compensate for the loss of the relationship as a result of the death of the child.

> "The inferior classifications of illegitimate children bears, in this instance, no significant relationship to those recognized purposes of recovery which (wrongful death portion of) worker's compensation statutes commendably serve". 406 U.S. at 175.

Thus, it is in defiance of this Court's opinion that the Court of Appeals in this case stated that this "similarity" of the circumstances of Mrs. Alexander to those who enjoy benefits

under the statute is irrelevant to Equal Protection jurisprudence. 114 F.3d at 140. In fact, the only thing of relevance is the comparison of the losses sustained by Karen Alexander and the losses sustained by other women who enjoy recovery under the statute.

The relevant circumstances of Karen Alexander with respect to the purpose of the wrongful death statute is absolutely identical to that of the women who are allowed to obtain compensation under the statute because her loss is identical. Both classes of women have lost the lives of the children they carried and lost the relationship and companionship with those children which the statute is designed to compensate. See, *Green v. Bittner*, 424 A.2d 210, 217 (N.J. 1980); *Carey v. Lovett*, 622 A.2d 1279, 1295 (1993). To compare the similarity of circumstances of the two classes it is incumbent upon the Court to compare the loss to the members of the two classes. In this Court's decisions in *Levy v. Louisiana*, 391 U.S. 68 (1868), *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968), and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) it was made clear that the nature of the loss to the survivors (the mother who lost her child in *Glona*; the children who lost their mothers in *Levy* and *Weber*) defined the similarity of circumstances with respect to the purpose of the wrongful death statute. Whether the mother who sought compensation for the death of her child, like the plaintiff in *Glona*, was married or unmarried at the time her child was born did not affect the nature of her loss if she possessed a relationship with her child, the loss of which was compensated by the statute. The only inquiry relevant to the similarity of circumstances which required the state to treat the two classes in a similar fashion was the factual inquiry of whether she had an actual relationship with her child.

Like the mother in *Glona*, Karen Alexander sustained a loss of her relationship with her daughter Kaylyn which placed her in exactly the identical circumstance as the mothers who are allowed claims under the New Jersey statute. Whereas the marital status of the mother in *Glona* bore no relationship to the loss she sustained, the location of Kaylyn at the moment her death ensued as a result of tortious conduct bears no relationship to the loss of Karen Alexander.

In *Glona* the differences concerning the marital status of the mother's who were denied claims constituted a "difference" not in

the losses the "different" classes sustained, but were merely the identification of facts which defined the classes of mothers themselves. It did not establish a difference in the circumstances of the class as it related to the loss each actually sustained. Likewise, where the death of Kaylyn occurred is only a fact which defines the class of mothers against whom New Jersey discriminates.

To explain the complete arbitrariness of New Jersey's classification and how discriminatory is its statute in denying a claim to Mrs. Alexander it is relevant to understand how utterly identical are the losses of the mothers who are denied a claim when compared to the losses of those who are permitted a claim. First, it is worth noting that it should be self-evident that the life of Kaylyn Alexander and Karen Alexander's interest in her life and the companionship and relationship she had with Kaylyn is totally equal with the life and relationship of any other child, and her mother's interest in her relationship with that child. No characteristic of the child could alter that fact. However, New Jersey's class has nothing whatsoever to do with any characteristic of the child or even age of the child. Every child throughout the entire gestational period is known and recognized under New Jersey law as both a person in fact and a person in law. The child is a human being throughout the entire period of gestation. *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960). If a tortfeasor injures a child in utero, at the very moment of injury the child is recognized as a person in fact and is treated as a person in law. Even if the prenatal injury results in death a wrongful death claim may be successfully brought, because there is a death of a person. A *Portee* claim for emotional distress may be brought because there is the death of a person who is a family member. *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988), *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993).

Thus, at the moment a wrongdoer injuries a child in utero there has been an injury to a human being, a person in fact. However, one event may subsequently occur after the injury which under New Jersey law leaves the survivors without a remedy: The parties must wait to see where the death later occurs. If the death is in the womb, the mother is denied a claim because the state creates the fiction that the child never existed and the loss was never sustained. But that fiction is created for the wrongful death claim, not the *Portee* claim which recognized the fact of the loss

regardless of the subsequent irrelevant events concerning where death ensues.

Thus, a child who is but four or five months gestation may be killed and the child's mother has a claim because death was outside the womb, but Mrs. Alexander does not have a claim although Kaylyn was full term. The losses are identical. The similarity of circumstances therefore are identical. Where the child was at the moment of injury is the same. Where the child was when death ensues is irrelevent to every element of the claim, the conduct sought to be deterred and the loss sought to be compensated.

Grave concerns are raised by this classification. First the equal protection violation is evident. This is particularly harmful where the lives of children are involved, and the future happiness of their mothers and their fundamental relationships in life are at stake. But it is particularly alarming where, as in medical malpractice cases such as Mrs. Alexanders, the tortfeasor who causes an injury to a child in utero - potential brain damage perhaps in cases like Kaylyn where her fetal distress goes untreated - are often the very people who are responsible to deliver the child alive. The conflict created where the individual is potentially liable for causing the prenatal injury is counted upon to ensure a live birth - a birth without which that individual can not be held liable - is all too palpable.

B. The Court of Appeals' Holding in this Case that the Legal Classification Created by New Jersey's Wrongful Death Statute is Controlling is in Direct Conflict with this Court's Decision in *Glona v. Amer. Guar. & Liab. Ins. Co.* and Violates the Very Purpose of the Existence of the Equal Protection Clause.

The Court of Appeals in this case held that New Jersey's decision that some persons should not be treated as persons under the law - its decision concerning the creation of a legal class - is controlling, and in effect, the fact that the classification bears no relationship to the purpose of the law is irrelevant. The Third Circuit stated:

> There, (*Giardina v. Bennett*) the New Jersey Supreme Court analyzed that statute and concluded

> that the legislature defined the wrongful death action with the intent of limiting it to the class of people considered persons by the common law . . . Accordingly we find no violation of the Equal Protection Clause. 114 F.3d at 1408.

This statement of the Third Circuit is in direct conflict with the decision of this Court in *Glona v. Amer. Guar. & Liab. Ins. Co., supra*. In *Glona*, the State of Louisiana contended it was free to restrict the definition of person to exclude some human beings from the benefit of its wrongful death statute. Like Louisiana in *Glona*, the State of New Jersey has also created persons from the benefits of the statute, claiming it is free to consider some persons in fact as non-persons in law. This Court expressly stated that such an approach is in direct violation of Equal Protection. The Court of Appeals has completely missed the point of this Court's decision. In *Glona*, a case in which a mother sought to recover compensation under the wrongful death statute for the loss of her child, this Court stated:

> To say that the test of Equal Protection should be the "legal" rather than the biological relation is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of the state to draw such "legal" lines as it chooses. *Glona* at 75, 76.

In *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988) the New Jersey Supreme Court identified the reason that the class of women whose children suffer a pre-birth death are barred from recovering under the Wrongful Death Statute. The court held that when the cause of action for wrongful death was first created in the nineteenth century (1877) it was not thought that the child was a separate human being and the law reflected the belief at that time that an "unborn child" was

> ...merely a part of his mother without separate existence or personalty. *Smith v. Brennan* 31 N.J. 353, 356 (1960) (discussing common-law treatment of the unborn); see *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (1884) (wrongful death statute inapplicable to fetus,

> as it was considered to have no existence separate from mother); *Stemmer v. Kline*, 128 N.J.L. 455 (E.&A. 1942) (adopting *Dietrich* analysis in declaring common-law basis for denial of recovery fore prenatal injuries);...It is readily inferable that the legislation adopted this common-law understanding of the concept of a "person" in the adoption of the Wrongful Death Act...*Giardina v. Bennett*, at 143.

This reason for inferring that the child who dies pre-birth was not intended to be included among those person's whose death's are actionable under the statute [that in the nineteenth century it was thought that the child was "merely a part of his mother"] was the very reason why New Jersey's common-law rejected claims for prenatal injuries. *Stemmer v. Kline*, 26 A.2d 684 (N.J. 1942). But in 1960 the New Jersey Supreme Court overruled *Stemmer v. Kline* because the belief that the child "was merely a part of his mother" was a false conclusion of fact and the modern appreciation of the scientific facts required a correction in the law to reflect the reality as it came to be understood. See, *Smith v. Brennan*, 157 A.2d 497, 502-505 (1960).

It is clear from reading *Giardina* and *Smith* together that the only reason New Jersey excludes from the protection of the statute mothers whose children die as a result of tortious conduct where the tortfeasors' acts cause death before birth can occur, is the incorrect understanding held in the nineteenth century that the child was not a separate human being before birth. This is the reason for the classification, and it does not embody an interest of the state which is legitimate to preserve or perpetuate. The whole purpose of *Smith v. Brennan* was to advance the purpose of tort law by having it reflect the true experiences of the people it is designed to protect and benefit. The fiction that Mrs. Alexander did not incur an important loss, which the statute is designed to compensate and protect against, serves no legitimate purpose. It was an imperfect statute when the state did not understand the facts; it is an unconstitutional statute now that the state does understand the facts and there is no reason to perpetuate the original injustice.

To support its construction of the statute *Giardina* also relied upon the fact that, although *Smith* corrected the mistake of fact in the area of prenatal torts, and the legislature recognized

infants who died pre-birth in statutes dealing with gifts, and workers compensation statutes, the failure of the legislation to correct the wrongful death statute is evidence of the legislature's intent to deliberately retain the discriminatory classifications. *Giardina v. Bennett*, 545 A.2d at 143. The fact that the discrimination is intended does not cure a violation of Equal Protection; it only underscores the need for this Court's intervention by protecting the Equal Protection Rights of those in Mr. Alexander's position.

When *Smith v. Brennan* overruled *Stemmer v. Kline* and recognized claims for prenatal injuries in New Jersey for the first time, the New Jersey Supreme Court observed that by recognizing the true scientific facts and creating the claim it was following a trend seen in other states which was driven by the modern appreciation of the scientific facts. See, extensive discussion, *Smith v. Brennan*, 31 N.J. at 356-361.

As a result of that trend, New Jersey is now one of the only ten states which refuses to provide wrongful death claims to mothers whose children are stillborn due to tortious conduct. The other nine are: [1] California, *Justus v. Atchinson*, 565 P.2d 122 (Cal. 1977); [2] Florida, *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695 (Fla. 1968); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Simon v. United States*, 438 F. Supp. 759, 761 (S.D. Fla. 1977) (applying Florida law); [3] Iowa, *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971); [4] Maine, *Milton v. Cary Medical Ctr.*, 538 A.2d 252 (Me. 1988); [5] Montana, *Kuhnke v. Fisher*, 683 P.2d 916 (Mont. 1984); [6] Nebraska, *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 229 (Neb. 1951); *Egbert v. Wenzl*, 260 N.W.2d 480 (Neb. 1977); *Smith v. Columbus Community Hosp., Inc.*, 387 N.W.2d 490 (Neb. 1986); [7] New York, *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969); [8] Texas, *Witty v. American Gen. Capital Distribs., Inc.*, 727 S.W.2d 503 (Tex. 1987); Virginia, *Lawrence v. Craven Tire Co.*, 169 S.E.2d 440 (Va. 1969).

C. It was Fundamental Error for the United States Court of Appeals to Uphold the Statute Without Identifying a Single Interest of the State Advanced by the Discriminatory Classification

In its determination of the Equal Protection Rights of Karen

Alexander, the United States Court of Appeals upheld the statute despite the fact that it could not identify a single state interest that was advanced by the discriminatory classification. See 114 F.3d at 1406-1408. Clearly the decision of the United States Court of Appeals was in direct conflict with this Court's decisions in *Levy v. Louisiana*, *Glona v. Amer. Guar. & Liab. Ins. Co.*, and *Weber v. Aetna*. In the process the Court of Appeals gratuitously, but quite erroneously, attributed to New Jersey's decision to create the classification the intent to "eliminate the nearly impossible problems of proof inherent in such actions when injury to a fetus is at issue." 114 F.3d at 1406. This gratuitous statement is false in two separate ways: [1] it is contrary to express statements of the New Jersey Supreme Court itself in which the Supreme Court said that there are no difficulties of proof; and [2] it is so illogical in the context of the New Jersey law which permits exactly those identical proofs which are established daily in the New Jersey Courts.

The *Giardina* Court emphasized that it did not reach its interpretation of the statutes based upon any concept that "fetal" injury would pose special problems of proof:

> Our reasons for not adopting a more expansive interpretation of the statutory term "persons" in this context do not relate to the speculative nature of damages that would occur if fetal death qualified as any actionable wrongful death under the act. *Giardina v. Bennett* at 147.

> *Giardina* echoed the principle found in *Smith v. Brennan*: ...the mere difficulty of proving a fact is not a very good reason for blocking all attempts to prove it. *Smith*, 157 A.2d at 503.

The United States Supreme Court has indicated that in Equal Protection cases, like this, difficulty of proofs cannot support an otherwise impermissible classification:

> Problems of proof cannot justify an impenetrable barrier that works to shield otherwise invidious discrimination. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

> The reason the statute excluded mothers whose children die

before birth was that the legislature acted under a false assumption of fact:

> The Act thus refers specifically to the wrongful death of a "person," to the "person injured," and to the "death of the person injured."...At the time the Act was enacted it was not generally thought that a fetus could be considered a "person," in a legal or juridical sense. This is evidenced by the common law, which treated an unborn child as being "merely a part of his mother without separate existence or personality." *Smith v. Brennan*, 157 A.2d 497, 502-503 (N.J. 1960) (discussing common-law treatment of the unborn); *see Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am.Rep. 242 (1884) (wrongful death statute inapplicable to fetus, as it was considered to have no existence separate from mother); *Stemmer v. Kline,* 128 N.J. L. 455 (E. & A. 1942) (adopting *Dietrich* analysis in declaring common law basis for denial of recovery for prenatal injuries);...It is readily inferable that the Legislature adopted this common-law understanding of the concept of a "person" in the adoption of the Wrongful Death Act. *Giardina,* at 143.

It is obviously wrong for the Court of Appeals to attribute to New Jersey as a reason for its classification difficulty of proof when the New Jersey Supreme Court has clearly stated that it is *not* the reason. But the New Jersey Supreme Court has articulated, when reading both *Smith v. Brennan*, 157 A.2d 497, 502, 503 (N.J. 1960) and *Giardina v. Bennett* that the entire reason is nothing other than a large mistake of scientific fact which has since been recognized as erroneous.

But there is a much more fundamental reason why the Third Circuit statement about the difficulty of proof (for which the Court can't cite to any New Jersey authority). The truth is that the causal relationship between the negligence of a tortfeasor who causes injury to a child in utero and the death of the child resulting from the tortious act is proven everyday in the New Jersey Courts. The illogical statement of the U.S. Court of Appeals is underscored by the fact that the New Jersey law allows the proofs of the causal relationship and the death even in stillbirth cases, themselves, to prove the *Portee* claim. A necessary element of

proving a Portee claim, whether it is in a live birth or stillbirth case, is the establishment of the causal relationship of the death of the child and the wrongful act of the tortfeasor. So not only has New Jersey expressly stated that the difficulty of proof is not an issue, but it permits those proofs even in stillbirth cases. Even if New Jersey didn't permit *Portee* claims in stillbirth cases, which of course it does, the statement of the U.S. Court of Appeals would remain just as illogical. When a tortfeasor injures a child in utero, such as Kaylyn Alexander, the proof of the causal relationship between the act which caused the original injury and the death itself requires identical proofs regardless of where the death ensues. In fact it is the nature of the proofs of the causal relationship which illustrates the arbitrariness of New Jersey's classification. When we put experts on the stand to express the opinion about the causal relationship there is no discussion about where the death ensued. It is totally irrelevant. The proofs are *exactly identical* in establishing the causal relationship whether the child's death ensues in the womb or outside the womb. The fact that New Jersey allows Karen Alexander to pursue a Portee claim in a stillbirth case, of course, is completely and totally dispositive of the issue, aside from New Jersey Supreme Court's express statements that difficulty of proof is totally irrelevant to the classification.

ATLA-NJ urges this Court to grant Certification. The constitutional rights of people cannot be disposed of on the kind of analysis provided by the United States Court of Appeals in this case. The opinion in *Alexander v. Whitman* provides extremely dangerous precedent that frustrates the rights of large segments of New Jersey's population, but also advances an Equal Protection jurisprudence which defies the holdings of this Court.

Once the identical nature of the proofs is understood the arbitrariness of the classification is clear. The classification in New Jersey's statute constitutes a total denial of the claim to a certain class of women, not a limit on the claim they have. See, *Giardina v. Bennett*, 545 A.2d 139, 143-147 (N.J. 1988). The facts of Mrs. Alexander's circumstances, and that of the members of her class, satisfy all of the elements of the claim. Whether the injured child's death is pre-birth or post-birth bears no relationship to the elements of the claim. The pertinent element concerning death is that there be a causal relationship between the death of the child and the tortious conduct of the defendant. Survival past birth

does not relate to the element of causal relationship. If a child is injured prenatally and dies from a cause unrelated to the injury resulting from the tortious conduct, it is irrelevant whether the child is born alive. Where and when the death occurs is irrelevant to this element of the wrongful death claim. The reference therefore, to where the child's death occurs only serves to define the class of mothers' who are denied the claim. Either the mother enjoys all of the benefits of the claim or she receives none despite the fact the loss to her is the same. The creation of the class is simply an arbitrary determination which excludes some victims who sustain the same loss as those who benefit from the claim. The holding of the United States Court of Appeals only stated that the exclusionary class was created. It did not identify a legitimate basis for it.

D. The Opinion of United States Court of Appeals in this Case is in Direct Conflict with the Opinion of this Court in *Weber v. Aetna*, 406 U.S. 164 (1972) as it Relates to the Standard of Scrutiny of the Classification of Mothers who are Denied Benefits Under the Statute.

The Court of Appeals in this case applied the rational basis standard of scrutiny. 114 F.3d at 406-408. That determination of the Court of Appeals is in direct conflict with *Weber v. Aetna*, 406 U.S. 164 (1972). *Weber v. Aetna* is the controlling decision of this Court as it relates to the exclusion of the class of individuals under the benefits of a wrongful death statute. In *Weber*, the Court clearly applied strict scrutiny because the statute implicated a fundamental personal right and the State had no compelling interest to justify the classification. *Weber*, 406 U.S. at 172-173. The Petition filed in this case set forth an analysis explaining why strict scrutiny is required (see, Petition at p.18 to 23). This analysis is quite consistent with the underlying purposes of New Jersey's wrongful death statutes. The New Jersey Supreme Court has made it clear that the interest that its wrongful death statutes protects is the interest a mother has in her companionship and relationship with her child. *Green v. Bittner*, 424 A.2d 210 (1980), *Carey v. Lovett*, 622 A.2d 1279, 1295 (1993). It is difficult to understand exactly why the Court of Appeals in this case did not apply strict scrutiny standard of review in defiance of *Weber v. Aetna*, a case which was binding

on that Court. The Court of Appeals did not even reference *Weber v. Aetna* or *Levy* or *Glona* in its Equal Protection analysis. These three cases, along with *Parham v. Hughes*, 441 U.S. 347 (1979) sets forth the model for Equal Protection analysis applicable to the wrongful death statutes. Because the Court of Appeals did not address those cases in the Equal Protection context, attempting to understanding its reasoning in refusing to follow *Weber* can be somewhat speculative. However, it is clear that the decision of the United States Court of Appeals is in direct conflict with the *Weber* decision in failing to apply strict scrutiny. Further, it can be inferred that the basis for the error of the Court of Appeals is its misunderstanding of the doctrine of State action. It appears that the Third Circuit thought that there had to be an accompanying due process violation in order for there to be an application of strict scrutiny. The Court dismissed the analysis of the Petitioner (and ignored this Court's holding in *Weber v. Aetna*) by stating:

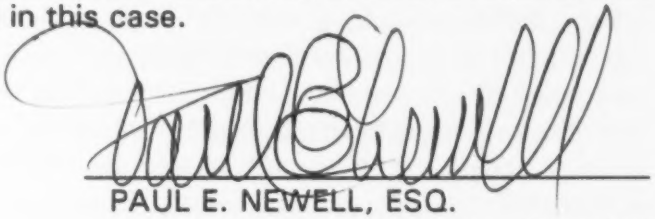
> As discussed earlier, Karen Alexander has not demonstrated how the statutes affect her relationship with her unborn child.

The statute affected her fundamental right by not protecting it when the State chose to protect the fundamental rights of other mothers who sustain the same loss. There can be no question that New Jersey's effort to protect the interests that a mother has in her relationship and companionship with her child, e.g. *Green v. Bittner, supra.*, being the very same interest protected by the Due Process Clause, e.g. *Santosky v. Kraemer*, 455 U.S. 745 (1982) requires that classification be subjected to strict scrutiny as indicated by *Weber*, for the very plain reason that no state can arbitrarily decide to protect the fundamental liberty interests of some persons within its territory, while refusing to protect the same fundamental interests of others, without showing that there is a compelling state interest for such discrimination.

CONCLUSION

The opinion of the United States Court of Appeals in this case, as it relates to the Equal Protection Rights of Karen Alexander, so conflicts with the controlling decision of this Court in *Levy*, *Glona*, *Weber* and *Parham* and has so ignored the basic

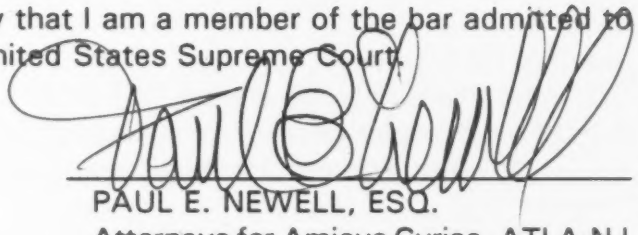
tenets of Equal Protection jurisprudence, that the opinion effectively overrules those decisions of this Court and requires that Certiorari be granted in this case.



PAUL E. NEWELL, ESQ.
Attorneys for Amicus Curiae, ATLA-NJ

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar admitted to practice before the United States Supreme Court.



PAUL E. NEWELL, ESQ.
Attorneys for Amicus Curiae, ATLA-NJ

(6)

No. 97-322

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KAREN F. ALEXANDER
Petitioner,

- against -

CHRISTINE TODD WHITMAN; et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF OF PETITIONER KAREN F. ALEXANDER

Harold J. Cassidy, Esq.
Counsel of Record
P.O. Box 280
225 Broad Street
Red Bank, NJ 07701
(732) 530-9779

Walter M. Weber, Esq.
The American Center
for Law and Justice
1000 Thomas Jefferson St. N.W.
Suite 609
Washington, DC 20007

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LEGAL ARGUMENT

I. RESPONDENTS' ARGUMENT IN SUPPORT OF NEW JERSEY'S DISCRIMINATION AGAINST KAREN ALEXANDER IS REALLY ONLY AN ARGUMENT AGAINST THIS COURT'S HOLDINGS IN *LEVY*, *GLONA* AND *WEBER*.

The Brief in Opposition advances arguments in defense of New Jersey's discrimination against Karen Alexander which are, in essence, arguments against the holdings of this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968), *Glona v. Amer. Guar.*, 391 U.S. 73 (1968), and *Weber v. Aetna*, 406 U.S. 164 (1972). The complete failure of Respondents to advance a single credible argument for distinguishing those decisions from the present case serves to highlight the clear conflict between the decision below and the controlling precedent of this Court.

A. The Standard of Scrutiny

Respondents' assertion that New Jersey's discriminatory classification requires no more than rational basis review is inconsistent with this Court's holding in *Weber v. Aetna*, 406 U.S. 164 (1972), and other precedent of this Court.

In *Weber* this Court held that the Equal Protection model set forth in *Levy* [which concluded that wrongful death statutes involve the familial relationship of mother and child] was controlling in cases involving state compensation statutes for the wrongful death of a family member, whether the right to recovery was based upon negligence or a workman's compensation theory. *Weber* expressly "reaffirm[ed] here the reasoning which produced that result [striking down the statute as violative of Equal Protection]." 406 U.S. at 172.[1] Noting that a legislative classification must, "at a minimum, . . . bear some rational

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[1] *Levy* stated: "We have been extremely sensitive when it comes to *basic civil rights* (citations omitted)...*the rights here asserted involve the intimate, familial relationship between a child and his own mother.*" 391 U.S. at 71 (emphasis added). For the historical context of *Levy*, *Glona* and *Weber* with respect to the recognition that a parent of an illegitimate child possesses a relationship protected as a fundamental interest by the Due Process Clause, see Pet. p. 19-22.

relationship to a legitimate state purpose," *id.* (citations omitted), this Court emphasized that "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a *stricter scrutiny*," id. (citations omitted). This Court went on to reject discrimination in a statutory compensation scheme for the death of a family member because the state interest asserted by Louisiana - in that case the interest in promoting childbirth in marriage - *"is not compelling" Id.* at 173 (emphasis added). *See also id.* at 176 ("the classification is justified by no legitimate state interest, compelling or otherwise").

Weber imposed strict scrutiny because the interests the statute was designed to directly protect were considered fundamental under the Due Process Clause. *Weber* emphasized the nature of the loss to the survivors which was involved, 406 U.S. at 169-174, as did *Levy*, 391 U.S. at 71. These interests were not peripheral to the purpose of the statute or only tangentially involved; rather, their direct protection was the central, if not sole, purpose of the creation of the statutory cause of action. *Weber*, as well as *Levy* and *Glona*, stand for the principle that a state, if it acts to directly protect a fundamental interest of individuals, cannot invidiously exclude any individual from that protection.

Some of *Weber's* reasoning for imposition of strict scrutiny has elements which are unique to Equal Protection analysis of state statutes which voluntarily undertake to directly protect fundamental rights or interests by creating a cause of action in tort. The wrongful death statute is an act of the State which is intended to affect private conduct. In that regard it differs from statutes which provide financial benefits paid by the State itself. However, because the statute represents a state plan to intentionally affect private conduct it impacts the fundamental rights involved in a most direct manner. The primary purpose of the statute is to deter conduct which negatively affects the fundamental interests of both the mother and child. The very existence of the statutory cause of action is a recognition by New Jersey that the statute influences private conduct and positively affects the fundamental rights it seeks to protect. Where deterrence fails the statute compels the wrongdoer, through the power of the State, to compensate for the loss of the relationship in which the victim possesses the interest.

Weber's reasoning is consistent, and possesses elements in common, with other cases of this Court which recognize the

general rules that [1] once a state extends a benefit to those within its borders which implicates fundamental rights, it can justify excluding some individuals from that benefit only if the classification promotes a compelling state interest.[2] and [2] where the state statute which excludes some persons from a benefit which is not itself a "fundamental right", but the act of excluding a particular class of individuals influences private conduct which affects a fundamental right, only a compelling state interest can justify the classification.[3]

In the instance where the state creates a cause of action which protects a fundamental interest, such as the wrongful death portion of the compensation statute in *Weber*, discriminatory denial of the claim to a class has the adverse affect upon the fundamental right by removing the deterrence effect of the statute. Moreover, the denial of benefits rewards and encourages the wrongdoer who destroys the fundamental interest by killing the child. See *Levy*, at 75 ("A law which creates an open season [on the children] gives a windfall to tortfeasors").

The denial of such claims or exclusion from access to Court to redress the grievance of one class of mothers directly denies what the state awards others, namely a judicial judgment for compensation for the relationship lost which is the object of the law's protection. As a result, the state treats in a completely

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[2]See, e.g. *Harper v. Virginia*, 383 U.S. 663 (1966) (the state was not required to create a particular right to vote, but once it did, the state was required to extend the right to all, absent a compelling state interest) see also *Kramer v. Union Free Sch. Dist.*, 395 U.S. 21 (1969); *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970)). For cases involving free speech, see *Carey v. Brown*, 447 U.S. 453 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972)

[3]See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational residency requirement in order to receive welfare benefits negatively impacts fundamental right to travel). See also *Mem. Hospital v. Maricopa County*, 415 U.S. 250 (1974) and *Dunn v. Blumstein*, 405 U.S. 330, 338-342 (1972). In this latter line of cases, strict scrutiny is imposed because the statute may deter the private act involved in travel. But even if travel is not deterred, strict scrutiny is imposed because the act of travel is "penalized" in the sense that the traveller does not receive a benefit others receive, even though there is no "right" to the benefit. See *Dunn*, at 338-342.

different manner the same fundamental interests of classes similarly situated. Because the wrongdoer can relieve himself of liability by letting the child die in the womb rather than rescue the child, the statute also removes the deterrence of the statute and actually replaces it with an incentive to achieve the very result the statute is designed to deter. This, of course, is of greatest concern in circumstances such as the birth of Kaylyn when the tortfeasor, who is liable for the initial injury to Kaylyn [due to untreated, or improperly treated, fetal distress], must be relied upon to save the life of the same child. The later failure to discharge the duty to save the child's life thus removes the liability for the original injury. And, of course, there is no liability for her wrongful death.

Respondents do not address *Weber's* requirement of a compelling interest, but instead raise two points which are clearly disposed of by *Weber*. Respondents argue that the entitlement to sue for wrongful death is not itself a fundamental right (Opp. p. 11). The Petitioner never asserted that it was. Nor did this Court suggest it was necessary for the claim for wrongful death itself to be "a fundamental right" to impose strict scrutiny. In striking down the statutes in *Levy*, *Glona* and *Weber*, this Court made it clear that although the wrongful death claim is not one to which there is a "right", fundamental or not, the arbitrary exclusion of some individuals who can establish each of the essential elements of the claim clearly violates Equal Protection. *Weber* employed strict scrutiny, not because there was a fundamental right to a wrongful death (or worker's compensation) claim, nor because there was a suspect class, but rather because the statute protected the familial relationship. It "involved" (*Levy*) and "approached" (*Weber*) a fundamental personal right.

Secondly, Respondents argue that the fact that the *Portee* claim is recognized in the context of a stillbirth death somehow cures the equal protection violation of the wrongful death and survival action statutes (Opp. p. 11-12). It should first be noted that not even the Court below made this argument.[4] The notion that allowing *Portee* claims to *all* mothers whose children are tortiously killed

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[4]When the court below addressed what it viewed as the relevance of the *Portee* claim, it was only in reference to a due process violation, that court did not suggest that the *Portee* claim would cure the Equal Protection violation inherent in denying the other two claims.

justifies arbitrarily denying wrongful death and survival claims to *some* mothers whose children are tortiously killed is patently absurd. The fundamental interest protected by the wrongful death claim - the interest in the relationship itself - is not protected by the *Portee* claim at all. Pet. p.10. *Weber* made it clear that even where a statute protects the discriminatory class in its relationship it still violates Equal Protection if the benefits of the statute is denied in some instances. 406 U.S. at 167-168. Here relationship is not protected at all. Furthermore, the *Portee* claim is not reported, officially or anecdotally, to be successfully pursued in the absence of a wrongful death or survival claim. Although she properly pled, and could prove, the negligence of defendants, and its causal relationship to Kaylyn's death, Karen Alexander did not have a *Portee* claim, for instance, which New Jersey recognized as recoverable, because she could not prove the *Portee* type damages to *herself*. [See Pet. App. A162-165].

B. There is No Legitimate State Interest Consistent with *Levy*, *Glona* and *Weber* Which Supports the Discriminatory Classification.

The only "interests" which the Respondents assert to justify New Jersey's invidious discrimination against Karen Alexander and all women similarly situated are [1] the "interest" in imposing a "limit" on the pertinent tort claim [Opp. 13-15]; and [2] a specious assertion that proof of the claim would be "speculative". [Opp. p.16]. The first asserted "interest" is not a legitimate interest at all since it is nothing more than a circular interest in the general process of drawing lines as such, not an interest which justifies that particular line or classification. *Glona*, 391 U.S. at 76 ("The Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses"). The second asserted "interest" is singularly illogical because the New Jersey Supreme Court has expressly stated that proof of damages in stillbirth deaths are *not speculative, are* permissible, and such proofs are *not the reason* why wrongful death and survival claims are not recoverable in stillbirth cases. Pet. pp.12-13. Furthermore the proofs in a stillbirth case are identical to the proofs in a livebirth case for which the wrongful death and survival claims are recognized. *Giardina v. Bennett*, 545 A.2d 139, 147 (N.J. 1988).

1.

The essential elements of the wrongful death claim include [1] the tortious conduct of the defendant; [2] the causal relationship between the tortious acts and death; [3] that the relationship between claimant and decedent falls among those to which the claim is limited; and [4] damages based upon the pecuniary value of the loss of the relationship and companionship with the loved one. The nature of the cause of action is limited only by these elements of the claim. The discriminatory classification at issue, therefore, is not a limit on a cause of action but rather the creation of a class of mothers who are arbitrarily excluded from recovery despite the fact they can prove all of the elements of the claim within the limits prescribed by the statute. Mrs. Alexander can prove negligence, death, causal relationship between the two, that her relationship is one covered by the statute and that she has the same damages as other mothers who lose their children. She falls within all of the limits on the claim. By disallowing her claim, New Jersey simply carves out an irrational exception to the wrongful death and survival statutes.

Once prenatal injury occurs while a child is still in the womb the child is a person for whose injury or death (or injury and death) a claim can be brought. This is true if the child lives and brings a claim for the injury only or whether the child dies, in which case survival action, wrongful death and *Portee* claims may be brought. Thus the tortious injury to a person in utero always forms the basis of a claim for injury or death to that person. It is therefore clearly irrational for New Jersey's fiction that Kaylyn was not a person to form a "basis" to deny Mrs. Alexander a wrongful death claim.

Respondents really advance the same argument rejected by this Court in *Glona*, that the state is free to withhold legal status from persons by calling them non-persons in the law. Respondents in actuality are simply arguing that the State's interest in drawing the line which defines the discriminatory class is its interest in drawing lines itself. *Glona* and *Levy* emphasized that the State is not free to treat a human being as a non-person, because "the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses." *Glona* at 75, 76. Like Louisiana, New Jersey ignores the reality that Karen Alexander lost a daughter as a result of tortious conduct. [See, Pet. p. 14-17].

2.

Respondents assert there is an "interest" of the State which "may" support the discriminatory classification: that proof of damages may be speculative [Opp.p.16]. Few of the Respondents' arguments illustrate the lack of credibility of their position in this case, or expose the weaknesses of the decision of the court below, more than this one. The New Jersey Supreme Court has stated that the proofs associated with stillbirth cases are *not* speculative and expressly rejected this assertion as an "interest" of the State which supports the discriminatory classification. In *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988) that Court stated:

> "Our reasons for not adopting a more expansive interpretation of the statutory term "person" in this context do not relate to the speculative nature of damages that would occur if fetal death qualified as an actionable wrongful death under the Act. This concern has not discouraged our recognition of the need for recovery in similar cases in recent years. Compare *Green v. Bittner*, 85 N.J. 1 (1980) (discounting speculative nature of pecuniary loss suffered by parents due to the child's death) with *Graf, supra*, 43 N.J. at 310-11..." 545 A.2d at 147.

Not only did the New Jersey Supreme Court, therefore, expressly reject the reason asserted by Respondents as an "interest" to support the classification, but it recounted the fact that *Green v. Bittner* expressly rejected the reasoning of *Graf*, 204 A.2d at 145 when *Green* in 1980 held that the mere proof of a parent-child relationship was sufficient to recover for loss of companionship even where the child was too young to introduce proofs to show that the child was likely to provide services. 424 A.2d 210, 85 N.J. 1, 15-17 (1980).[5]

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[5] "Absent special circumstances, it could be claimed that the mere parent-child relationship does not show that it is more probable than not that such services would have been rendered had the child lived. ...Given the speculative quality of the inferences, it might further be questioned whether one could realistically attach or estimate pecuniary value to such services. Our answer is, even assuming no special circumstances are proven, that...[our Courts] allow damages even though inferences, and the estimate of damages, are based on uncertainties...we are not about to deny this pecuniary element of

Moreover, the proofs in a stillbirth case and a livebirth case where the child dies shortly after birth are identical on both liability and damages. On liability, proofs of the *Portee* claim permitted in stillbirth cases, which includes proof of the causal relationship between tortious act and death, proves the liability portion of the wrongful death and survival action as well. On damages, the circumstances involving proof of companionship is identical had Kaylyn lived a short while outside the womb.

Just as importantly, the only real reason for the classification was the mistake of fact of the legislature when, in the nineteenth century, it believed that the child was not a human being, a separate person in fact, but only a part of the mother. [See Pet. p. 11-14]. Respondents argue that the State intended to exclude Mrs. Alexander from the benefit of the statute because the state intentionally adopted this mistaken nineteenth century understanding for purposes of the wrongful death statute. Respondents cite as evidence that this discrimination was intentional the fact that the legislature knew enough to treat a child in utero as a person in other contexts, e.g. worker's compensation act, and the gift act. (Opp. p. 14.) While this may support a conclusion that the State legislature now knows the truth about the underlying mistaken assumption of fact which the Supreme Court acknowledged and corrected in the context of a common law claim in *Smith v. Brennan*, and has deliberately chosen to retain the discrimination in one context and not another, this does not exonerate the Equal Protection violation. Rather, it only serves to illustrate that the discrimination is intentional. This inconsistency in the treatment of Kaylyn only illustrates the invidiousness of the discrimination, a point made in *Glona* where this Court observed a similar pattern of inconsistency in Louisiana's laws. See *Glona*, 391 U.S. at 74-75.

C. *Levy*, *Glona* and *Weber* are Indistinguishable.

Respondents claim that the reasoning and applicability of *Levy*, *Glona* and *Weber* can be distinguished from this case because [1] New Jersey allows claims for the loss of illegitimate children; and

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prospective companionship and advice for a child because it may be somewhat more conjectural." *Green*, 545 A.2d at __, 85 N.J. at 15-16.

[2] the children Louisiana called non-persons in fact [illegitimates] are persons who have been found to have constitutional rights while Kaylyn Alexander does not. [Opp. p. 18] Neither of these arguments distinguish those cases with respect to Mrs. Alexander's own personal Equal Protection claim.

It is absurd to suggest that because New Jersey has chosen to discriminate against a different class of mothers than the class involved in the Louisiana statutes, that the Equal Protection model and analysis found in *Levy*, *Glona* and *Weber* do not apply. In *Glona* the mother was involved in the illicit conduct targeted by Louisiana's statute. Yet, because of the familial interests protected by the statute, even the state's interest in encouraging childbirth within marriage could not justify excluding that mother from the benefit of the statute. 391 U.S. at 75. The interest of the State did not bear any real relationship to the purpose of the statute as long as the mother actually sustained the loss of her relationship with her child. *Id; Weber*, 406 U.S. at 173-175. Here, New Jersey has *no* interest at all. In fact, the classification is completely irrational and encourages defeat of the purpose of the statute itself.

Likewise the separate legal question of whether Kaylyn possesses any constitutional rights is irrelevant to Karen Alexander's Equal Protection rights. When it comes to her own rights, the only fact which is relevant is whether Mrs. Alexander sustained the loss of a daughter, not the legal question of whether her daughter has a separate Equal Protection claim.

II. THE RESPONDENTS AVOID ANY ATTEMPT TO DEFEND THAT PORTION OF THE LOWER COURT'S OPINION WHICH STATES THAT THE FACT KAYLYN ALEXANDER IS A HUMAN BEING IS IRRELEVANT TO THE LEGAL QUESTION OF WHETHER SHE HAS CONSTITUTIONAL RIGHTS.

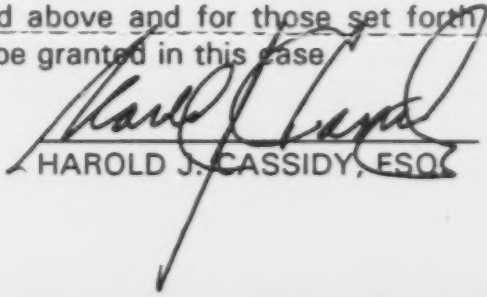
Respondents maintain that - although they cannot bring themselves to refer to her by name - Kaylyn Alexander did not possess Equal Protection rights. They avoid addressing, however, the most essential issues required to reach a legal determination about Kaylyn's rights. Respondents fail to address the legal relevence of the acknowledgement of the Court below that Kaylyn was a complete, separate, unique, irreplaceable human being from conception who experienced pain beginning at eight weeks

gestation. [Pet. p.25-28]. The Court below expressly acknowledged that it was bound by the fact that Kaylyn was a person in fact, 114 F.3d at 1401, but mistakenly interpreted this Court's holding in *Roe v. Wade* to mean there are human beings who have no constitutional rights. 114 F.3d at 1402.

Instead of defending this portion of the opinion of the Court below, respondents prefer to go back in time when *Roe* stated it did not know when the life of a human being began. Respondents rely upon this past lack of knowledge citing to an opinion of a single justice, that "a developing organism that is not yet a 'person' does not have [constitutional rights]." [Opp. p. 9]. This statement is a reiteration that the child was not thought by the *Roe* Court to be a person in fact. *Roe* addressed the entire legal question from the perspective that, at that time, the Court did not know whether the child was an actual human being. The Court thought it was dealing with merely "potential" human life. 410 U.S. at 162-164. The Respondents carefully avoid asserting that the fact the child is a human being is irrelevant to whether she possesses rights. *Roe* never said it was irrelevant. No other opinion of this Court ever held it was irrelevant. This Court's statements have always been to the contrary, that every human being possesses Equal Protection rights. *Levy*, at 70 [See Pet. p.26-28]. *Glona* and *Levy* held that a state is not free to treat a human being (a person in fact) as a non-human being (a person denied "legal status" as person). *Glona*, at 75-76. The Court below, however, has interpreted *Roe* to mean that the fact Kaylyn is a person is irrelevant to the legal question of whether she is a person with rights. That interpretation is not only subject to misuse in other contexts, as observed in the concurring opinion, it is actually abusive in the context of this case where children are killed against the will of the mother with impunity. The Respondent's refusal to defend this portion of the lower court's decision emphasizes the need for this Court to grant certiorari.

CONCLUSION

For the reasons stated above and for those set forth in the Petition certiorari should be granted in this case.



HAROLD J. CASSIDY, ESQ.